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BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MISSOURI

TRANSCRIPT OF PROCEEDINGS

Order Setting Closing Arguments

December 8, 2003
Jefferson City, Missouri
Volume 6

BPS Telephone Company, Cass County)	
Telephone Company, Citizens Telephone)	
Company of Higginsville, Missouri,)	Case No.
Craw-Kan Telephone Cooperative, Inc.,)	TC-2002-1077
Fidelity Telephone Company, Grand River))	
Mutual Telephone Corporation, Green)	
Hills Telephone Corporation, Holway)	
Telephone Company, IAMO Telephone)	
Company, Kingdom Telephone Company,)	
K.L.M. Telephone Co., Lathrop Telephone))	
Company, and Mark Twain Rural Telephone))	
Company,)	
)	
Complainants,)	
)	
vs.)	
)	
Voicestream Wireless Corporation,)	
Western Wireless Corp., and)	
Southwestern Bell Telephone Company,)	
)	
Respondents.)	

KEVIN A. THOMPSON, Presiding,
Deputy Chief Regulatory Law Judge

REPORTED BY:
Jennifer L. Leibach
ASSOCIATED COURT REPORTERS

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11 County Telephone Company,
12 Citizens Telephone Company of
13 Higginsville, Missouri, Craw-Kan
14 Telephone Cooperative, Inc.,
15 Fidelity Communication Services
16 I, Inc., Fidelity Telephone
17 Company, Grand River Mutual
18 Telephone Corporation, Green
19 Hills Telephone Corporation,
20 Holway Telephone Company, Iamo
21 Telephone Company, Kingdom
22 Telephone Company, KLM Telephone
23 Company, Lathrop Telephone
24 Company, Mark Twain Rural
25 Telephone Company

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FOR: Southwestern Bell Telephone, L.P.
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A P P E A R A N C E S (con't)

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FOR: T-Mobile, USA, Inc., Western
Wireless, Aerial Communications

1 PROCEEDINGS

2 JUDGE THOMPSON: Good morning, we are
3 here for closing arguments in the matter of BPS
4 Telephone Company and others versus Voicestream
5 Wireless Corporation, Western Wireless Corporation,
6 and Southwestern Bell Telephone Company, Case No.
7 TC-2002-1077.

8 My name is Kevin Thompson, I'm the
9 Regulatory Law Judge assigned to preside over this
10 matter, and we will begin with oral entries of
11 appearance at this time. Why don't we start with the
12 Complainants. Mr. England.

13 MR. ENGLAND: Thank you, your Honor.
14 Let the record reflect the appearance of W.R. England
15 and Brian T. McCartney on behalf of the Complainants.
16 Mailing address is Brydon, Swearngen & England, Post
17 Office Box 456, Jefferson City, Missouri, 65102.

18 JUDGE THOMPSON: Thank you very much,
19 Mr. England. Mr. Johnson.

20 MR. JOHNSON: Your Honor, thank you.
21 On behalf of Respondent's Voicestream, now known as
22 T-Mobile, USA, Western Wireless and Aerial
23 Communications. Let the record reflect the
24 appearance of Mark Johnson of Sonnenschein, Nath &
25 Rosenthal, 4520 Main Street, Suite 1100, Kansas

1 Missouri, 64111.

2 JUDGE THOMPSON: Thank you. Mr. Bub.

3 MR. BUB: Thank you, your Honor. Leo

4 Bub for Southwestern Bell Telephone Company. Our

5 address is One Bell Center, St. Louis, Missouri,

6 63101.

7 JUDGE THOMPSON: Thank you, Mr. Bub.

8 Mr. Bates.

9 MR. BATES: Thank you, your Honor. My

10 name is Bruce H. Bates. I'm appearing today on

11 behalf of the Staff of the Missouri Public Service

12 Commission. Our mailing address is Post Office Box

13 360, Jefferson City, Missouri, 65102.

14 JUDGE THOMPSON: Thank you, Mr. Bates.

15 Prior to go on the record, we have conferred and set

16 an order, and so we will hear from Mr. England first.

17 MR. ENGLAND: Thank you, your Honor.

18 May it please the Commission. My name is Trip

19 England. I represent the Complainants in this case.

20 This case involves, I think as we all know, wireless

21 originated traffic that has been terminated via the

22 facilities of Southwestern Bell to the exchanges

23 served by my clients, the 14 named Complainants in

24 this case.

25 This traffic was delivered without an

1 agreement between Complainant -- excuse me, wireless
2 carriers and Complainants, and to date, there has
3 been no payment for this traffic with the exception
4 of some small amount of payments that Mr. Williams
5 referred to in his testimony in the November 5th and
6 6th hearings, and that was only by Western Wireless.
7 The vast majority of the traffic remains
8 uncompensated at this time.

9 In approximately May of 2002, we filed
10 this complaint with the Commission. We primarily
11 filed the complaint at that time because the wireless
12 tariffs, which form the basis for a large portion of
13 our claim, were on appeal and pending before the
14 Missouri, I believe, Court of Appeals at that time,
15 and it wasn't until April of 2003 that we received a
16 decision from the Missouri Court of Appeals regarding
17 the lawfulness and reasonableness of those wireless
18 tariffs.

19 And if I may, because it gets to one of
20 the arguments, I believe, of the Respondent wireless
21 carriers, the Court of Appeals found that the
22 Complainants intrastate wireless termination service
23 tariffs were lawful and reasonable and your Order
24 approving those tariffs were lawful and reasonable.
25 Your Order was not pre-empted by the

1 Telecommunications Act of 1996, and in reaching that
2 decision, I'm always quick to quote a statement of
3 the court that I think captured the essence of the
4 problem.

5 The Court stated at 112 S.W. 2nd, 20 is
6 the page number of the opinion, where it begins, and
7 I'm not sure -- my copy doesn't tell me what page
8 this is on, but it's right above the break entitled
9 call blocking. The Court stated quote the tariffs
10 reasonably fill a void in the law where the wireless
11 companies routinely circumvent payment to the rural
12 carriers by calculated inaction. The tariffs provide
13 a reasonable and lawful means to secure compensation
14 for the rural carriers in the absence of negotiated
15 agreements, and in fact, with the exception of
16 T-Mobile, formally Voicestream, these tariffs have
17 worked rather well.

18 The testimony in this case demonstrates
19 that all major wireless carriers are compensating the
20 Complainants either through the wireless termination
21 tariffs that they have or through traffic termination
22 agreements that have recently been negotiated and
23 submitted to the Commission for approval.

24 In the first phase of this proceeding,
25 we submitted prepared written testimony, as did

1 Southwestern Bell and Staff, and agreed to waive
2 cross-examination and submitted it on the briefs.
3 The Commission was then concerned with the
4 jurisdiction of the traffic, that being whether it
5 was intraMTA or interMTA, and therefore reopened the
6 record looking for evidence that might indicate how
7 much of this traffic was within the MTA and
8 conversely how much was without the MTA.

9 Unfortunately, all parties agree there
10 is no evidence presently available, certainly in the
11 record, that would indicate the jurisdictional nature
12 of this traffic. I think the record will also
13 reflect that the ability of the parties to perform a
14 traffic study on a go-forward basis would be
15 burdensome, time-consuming, and very expensive, if
16 one were even to be conducted, so in lieu of that,
17 the Respondent wireless carriers suggested, and the
18 Complainants were willing to try to reach an
19 agreement regarding the amount of interMTA traffic,
20 and we did so by arriving at percentages or factors.

21 Those were then submitted to
22 Southwestern Bell to see if they could agree to them,
23 to which Southwestern Bell indicated they could not,
24 and in fact, they objected to all of the agreed to
25 factors, all 14, and the -- and the nonunanimous

1 stipulation that the Complainants and wireless
2 carriers had agreed or entered into.

3 As a consequence, this Commission
4 established a hearing, as you would in a case where a
5 nonunanimous stipulation is contested by one or more
6 of the nonsignatory parties, and prior to hearing in
7 the, I believe, issues statement, we were able to
8 further narrow the issue with respect to just three
9 companies, so my understanding is that no one now
10 objects to the interMTA factors for 11 of the
11 Complainants, and the only three remaining factors to
12 be determined were those that were negotiated between
13 BPS, Craw-Kan, and Mark Twain Telephone Companies on
14 the one hand, and T-Mobile, and then subsequently
15 agreed to by Western as well.

16 Those factors are, for BPS, 52 percent,
17 and for Craw-Kan and Mark Twain, they were 53 percent
18 each. Before I begin discussion or an argument, I
19 guess, as to why I think these factors are
20 appropriate and ought to be adopted by the
21 Commission. Commissioner Gaw had a question at the
22 conclusion of our November 5th and 6th hearing to the
23 -- I think to the effect of whether or not an
24 agreement between the Complainants and wireless
25 carriers in this case should be afforded any greater

1 weight given the Telecommunication Act preference for
2 agreements between carriers.

3 I've been unable to find any case law
4 or rules of the FCC that would answer that question.
5 My feeling is that simply because we have agreed to
6 these factors with the Complainants, should not give
7 any more deference to them than you would otherwise
8 give to a nonunanimous stipulation, and I believe you
9 ought to treat our nonunanimous stipulation as you
10 would any other nonunanimous stipulation that's
11 submitted to you, but I believe that the facts in the
12 record are sufficient to support this nonunanimous
13 stipulation as we demonstrated, I believe, in our
14 testimony and then at the hearing on November 5th and
15 6th, these three factors are intuitive.

16 They are based upon an examination of
17 where the Complainant exchanges lie within MTA and
18 LATA boundaries and with relation to or reference to
19 the interconnection points where the wireless
20 carriers interconnect with Southwestern Bell's
21 facilities. These factors were arrived at at
22 arm's-length negotiations to unaffiliated parties,
23 obviously looking after their own self-interest were
24 able to reach an agreement to these numbers, and I
25 think there is some deference and credibility in that

1 process.

2 These factors are consistent with other

3 factors that have been agreed to by some of the

4 Complainants and other wireless carriers such as

5 Verizon Wireless and Sprint PCS, and finally in Mark

6 Twain's case, Mark Twain did perform a traffic study

7 of sorts. They examined all of the NPA/NXX's from

8 T-Mobile callers that terminated calls to the Mark

9 Twain exchanges and found that approximately 70

10 percent of those NPA/NXX's, those telephone numbers

11 associated with those originating calls, were located

12 outside the MTA in which Mark Twain's exchanges are

13 located.

14 Another issue that came up, well,

15 actually, it was there all along, but drew a

16 considerable amount of attention at the November 5th

17 and 6th hearings, was the issue of secondary

18 liability, and in that regard, let me quote from this

19 Commission's December 23rd, 1997, decision in Case

20 No. TT-1997-524. This is a case involving

21 Southwestern Bell's revised tariff filing to revise

22 their wireless interconnection tariff on file here

23 with the Commission, and essentially, by that filing,

24 they wanted to establish the transit function that

25 they currently provide today to wireless carriers.

1 The Commission authorized that revised
2 tariff, eventually, but in doing so, it stated on
3 Page 21 of the Report and Order, in the event, quote,
4 excuse me, in the event a wireless carrier refuses to
5 pay a third party LEC for such termination, and the
6 wireless carrier does not have a reciprocal
7 compensation agreement with the third party LEC, SWBT
8 will remain secondary liable to the third party LEC
9 for the termination of this traffic, but will be
10 entitled to indemnification from the wireless carrier
11 upon payment of the loss. Period. End quote.

12 The Commission further stated in the
13 next paragraph on the same page, similarly if SWBT
14 knows it will be secondary liable to the third party
15 LECs, it will have an incentive to enforce the
16 provisions of its tariff, and I emphasize the next
17 few words, and its interconnection agreements, which
18 require wireless carriers to enter into agreements
19 with third party LECs, end quote.

20 It's clear to me from those quotes that
21 this Commission intended for there to be secondary
22 liability on Southwestern Bell for the termination of
23 this traffic, and that that secondary liability was
24 to apply both to traffic that they terminated under
25 their wireless tariff and traffic that they

1 terminated to third party LECs under interconnection
2 agreements, which is the traffic we're dealing with
3 here today.

4 There's been a great deal of discussion
5 as to what secondary liability means. I'm not sure
6 that I can add a great deal to it. We did do some
7 research. Blacks Law Dictionary defines secondary
8 liability as quote liability that does not arise
9 unless the primary liable party fails to honor its
10 obligation, end quote, and the Restatement Second of
11 Torts in Section 876(b) states that secondary
12 liability under Section 876(b) attaches when one act
13 or quote knows that the other's conduct constitutes a
14 breach of duty and gives substantial assistance or
15 encouragement to the other so to conduct himself, end
16 quote.

17 Quite honestly, I'm not sure what
18 secondary liability means, but I think it means
19 something or you wouldn't have put it in your Order.
20 The unfortunate thing is only one of you was on the
21 Commission at the time that that Order was issued, so
22 you may be in a quandary yourselves as to what your
23 predecessors meant, but I assumed it meant something,
24 and as a result, that's why we have included
25 Southwestern Bell as a Respondent in this Complaint.

1 We are looking to you for guidance. We
2 believe that we have exhausted as many remedies as we
3 need to exhaust to get to this point to invoke
4 secondary liability. In that regard, I'm not sure
5 how much remedy we have to exhaust, but Southwestern
6 Bell specifically asked this Commission, after the
7 Order came out, in its wireless tariff case to
8 clarify its secondary liability obligation, and this
9 Commission addressed that in its Order Denying
10 Motions for Rehearing or Clarification issued January
11 28th of 1998.

12 The Commission stated quote SWBT asks
13 the Commission to state in a clarifying Order that
14 before its quote secondary liability end quote will
15 arise, third party local exchange companies must
16 first exhaust their remedies under the
17 Telecommunications Act of 1996 and before the
18 Commission, including through requests for
19 interconnection, arbitration and the filing of
20 tariffs. Period. SWBT also requests a clarification
21 that secondary liability should be imposed where the
22 wireless carrier is insolvent. Period. End quote.

23 This Commission, without discussion,
24 denied Southwestern Bell's Motion for Clarification,
25 so I'm not sure that there's any obligation on the

1 Complainant to exhaust any remedies; however, I
2 submit to you that we have done quite a bit by
3 bringing this Complaint to you all and pursuing it as
4 far as we have.

5 What do we ask in this case? We ask
6 that you issue your Order finding that the Respondent
7 wireless carriers are primarily liable for the
8 traffic that they have terminated to the
9 Complainants. The amount of that traffic, we
10 believe, is accurately shown by the cellular
11 transiting usage summary reports, CTUSRs, that we
12 received from Southwestern Bell summarizing that
13 traffic on a monthly basis.

14 How much is inter and intraMTA traffic?
15 We believe that there is sufficient evidence in the
16 record for you to adopt those factors that all 14
17 Complainants have agreed to with both T-Mobile and
18 Western Wireless for the reasons I previously stated.

19 To the extent that there is interMTA
20 traffic terminating the Complainants, we ask that you
21 find that our intrastate access tariffs apply to this
22 traffic. To the extent that there is intraMTA
23 traffic terminating to these Complainants, we ask
24 that you find that our intrastate wireless
25 termination tariff applies to this intraMTA traffic,

1 and to the extent necessary to respond to wireless
2 carriers arguments, we ask that you reaffirm that
3 tariff, just like the Court of Appeals did, and in
4 addition, find that the provisions authorizing the
5 assessment of late payment fees and reasonable
6 attorney's fees, which are provisions contained in
7 that tariff, are also appropriate.

8 And finally, if the wireless carriers
9 are still reluctant to pay after you have issued an
10 Order directing them to do so, that you hold
11 Southwestern Bell secondary liable for these amounts.
12 Thank you.

13 JUDGE THOMPSON: Thank you, Mr.
14 England. Questions from the Bench? Chairman Gaw.

15 CHAIRMAN GAW: I'll pass. Thank you.

16 JUDGE THOMPSON: Commissioner Murray.

17 COMMISSIONER MURRAY: I believe I pass,
18 thank you.

19 JUDGE THOMPSON: Commissioner Forbis.

20 COMMISSIONER FORBIS: No, your Honor.

21 JUDGE THOMPSON: Commissioner Clayton.

22 COMMISSIONER CLAYTON: I don't think I
23 have any questions.

24 JUDGE THOMPSON: I have a question for
25 you, Mr. England.

1 MR. ENGLAND: Certainly.

2 JUDGE THOMPSON: For the purposes of

3 discussion, let's assume that secondary liability is

4 equivalent as being a guarantor, a parent who cosigns

5 a child's automobile loan.

6 MR. ENGLAND: I'm well aware of that,

7 your Honor.

8 JUDGE THOMPSON: I wanted to bring it

9 home to you, so that we could --

10 MR. ENGLAND: That's painfully close to

11 home.

12 JUDGE THOMPSON: Okay. And I guess my

13 question is this. Can the primary debtor compromise

14 the client in some respect, and through an agreement

15 with the creditor, and is that something that the

16 guarantor then can contest or are they stuck with it?

17 MR. ENGLAND: Boy, that's a good

18 question. I would say that to the extent that that

19 arrangement between the primary debtor and the

20 creditor resolves all of the underlying claims, then

21 I'm not sure that the guarantor has a dog in that

22 fight.

23 If I see where you're going with this,

24 in this case, we haven't resolved all of the

25 underlying claims, we've simply resolved an issue of

1 what portion of the traffic is inter versus intraMTA,
2 and I'm not sure that -- I'm not sure that SWBT
3 doesn't have the ability to contest those factors.

4 JUDGE THOMPSON: Okay. But between
5 Complainants and the wireless Respondents, with
6 respect to the 14 factors, is the agreement the
7 settlement between Complainants and those
8 Respondents, is that binding?

9 MR. ENGLAND: Only if you approve it,
10 your Honor.

11 JUDGE THOMPSON: Okay.

12 MR. ENGLAND: And I guess another issue
13 that I neglect, or another reason, why I neglected to
14 give you support for these factors gets back to the
15 indemnification that Southwestern Bell has obtained
16 from the wireless carriers, both through its tariff
17 and through its interconnection agreements, so to the
18 extent they're worried about if you will pay more for
19 this traffic because it's now access traffic as
20 opposed to wireless tariff traffic, they do have that
21 right of indemnification back against T-Mobile and
22 Western, in this case, specifically based on their
23 interconnection agreements, and I believe Mr. Bub
24 admitted as much in argument or opening statement at
25 the November 5th and 6th hearing.

1 JUDGE THOMPSON: Thank you, Mr.
2 England. Other questions from the bench? Hearing
3 none, you're excused. Thank you very much. Mr.
4 Johnson, I believe you're up.

5 MR. JOHNSON: To reintroduce my
6 clients, Western Wireless and Voicestream used to be
7 affiliated companies, Western Wireless owned
8 Voicestream until 2000, pardon me, 1999, when
9 Voicestream was spun out of Western Wireless and
10 companies became separate.

11 In 2000, Voicestream acquired Aerial
12 Communications, and then in August of last year, in
13 August of 2002, Voicestream changed its name to
14 T-Mobile USA, so that's why the Respondents are now
15 T-Mobile, Western Wireless and Aerial, although
16 Aerial is a part of T-Mobile.

17 I find myself in a curious position in
18 that I agree with Mr. England's arguments on the
19 issue that is before the Commission, and that is
20 whether the jurisdictional allocations negotiated
21 between the Complainant's local exchange carriers,
22 represented by Mr. England, and the Respondent
23 wireless carriers, which I represent, the
24 jurisdictional allocations negotiated among those
25 companies.

1 That's the issue which the Commission
2 asked us to address in its Order of May 5, 2003, and
3 the parties have addressed that in both pre-file
4 testimony and in cross-examination at the hearing.
5 All of the parties agree, including Southwestern
6 Bell, that negotiation is the best solution, and that
7 negotiation is a lawful manner to resolve this issue.

8 In terms of record references to
9 support that, I refer you to Mr. Scheperle's
10 testimony of September of 2003, in particular Pages
11 4, lines 10 through 12, and 9, lines 17 through 19.
12 In Complainants testimony, Mr. Schoonmaker testified
13 to that in his direct testimony, which is in evidence
14 as Exhibit 1, on Page 14, lines 4 and 5, and finally,
15 on behalf of the Respondents, Mr. Williams testified
16 to that in his direct testimony in evidence as
17 Exhibit 3 on Pages 3 and 4.

18 Not only did the parties agree that
19 negotiation is the appropriate manner to resolve this
20 dispute, but the parties also agree that the proposed
21 jurisdictional allegations are correct, and there I
22 should say that's with the exception, of course, of
23 Southwestern Bell. Again, as record references, I
24 point you to Mr. Scheperle's testimony at the
25 hearing, this is Volume 4 of the transcript on

1 November 6th of 2003, Page 131, lines 1 through 20.
2 On behalf of the complainants, Mr. Schoonmaker's
3 testimony supporting the adoption of the proposed
4 jurisdictional allocations appears in his direct
5 testimony on Page 14, lines 4 through 9, that's
6 Exhibit 1, and finally on behalf of the Respondents,
7 Mr. Williams in Exhibit 3, his direct testimony, and
8 Exhibit 4, his surrebuttal testimony, urged adoption
9 by the Commission of the proposed allocations.

10 The only party questioning the
11 percentages agreed to between the Respondent wireless
12 carriers and the Complainant local exchange carriers
13 is Southwestern Bell. And as Mr. Kern, the witness
14 for Southwestern Bell testified, Southwestern Bell's
15 only interest is because of the possibility of its
16 secondary liability. He agreed to that when I asked
17 him whether Southwestern Bell had any interest other
18 than secondary liability in his cross-examination,
19 which appears at Volume 5 of the transcript on Pages
20 -- on Page 308, lines 18 through 24.

21 In fact, Mr. Kern also acknowledged
22 that there were negotiations, but he, as the witness
23 for Southwestern Bell, didn't even know if his
24 company had asked to participate in those
25 negotiations, so Southwestern Bell was aware of the

1 negotiations and its witness didn't even know if they
2 had asked to participate, and as a record citation
3 for that is Page 308, lines 18 through 20 of the
4 hearing transcript.

5 So in effect, Southwestern Bell's only
6 concern here really isn't justified. As Mr. England
7 indicated, the Commission several years ago did say
8 that Southwestern Bell could be secondary liable if
9 the carriers, pardon me, if the originating carriers
10 did not pay appropriate compensation to the
11 terminating local exchange carriers, but in that
12 Order, the Commission also said that Southwestern
13 Bell could be indemnified, and subsequent to that, in
14 its tariff, and in interconnection agreements
15 negotiated with the wireless carriers, Southwestern
16 Bell has, in effect, protected itself.

17 It has negotiated, put into its tariff
18 and negotiated interconnection agreements
19 indemnification provisions which clearly state that
20 if the wireless carrier, in other words, if my
21 clients fail to pay appropriate compensation, then
22 Southwestern Bell would be indemnified. In other
23 words, if it has to pay, they could come back -- it
24 could come back against my clients, so in essence,
25 what Southwestern Bell has done is effectively remove

1 itself from this dispute, even though at this point
2 Southwestern Bell has chosen to inject itself into
3 it.

4 We don't think that Southwestern Bell
5 really has a dog in this hunt. We believe that
6 Southwestern Bell is fully protected against the
7 theoretical secondary liability, and I say
8 theoretical because as Mr. Scheperle indicated in his
9 rebuttal testimony filed in September of last year,
10 in other words in September of 2002, that testimony,
11 that pre-filed testimony was stipulated into the
12 record when the case was submitted on the record.

13 He indicated there that as far as he
14 knew, that Southwestern Bell has never been asked for
15 any compensation. In other words, this theoretical
16 secondary liability is nothing but theoretical. It
17 has never come into play in the several years since
18 you indicated that it was a possibility.

19 Now, one issue, which Mr. Scheperle
20 addressed in his pre-filed testimony and which was
21 the subject of some cross-examination, was the
22 possibility of what could be viewed as a traffic
23 study. In other words, the Staff indicated that
24 collecting data on several items could allow for the
25 approximation of a jurisdiction allocation, but

1 what's important to remember there is that at the
2 time Mr. Scheperle prepared that pre-filed testimony,
3 one of my clients, Western Wireless, had not
4 specifically agreed to the jurisdictional
5 allocations. This was after direct testimony had
6 been filed by Mr. Williams on behalf of Voicestream
7 and Western Wireless, and in his direct testimony, he
8 did not specifically state that Western Wireless was
9 adopting these -- the agreed percentages.

10 He did so, however, state that in his
11 surrebuttal testimony, so it's clear on the record
12 that both Voice -- pardon me, T-Mobile and Western
13 Wireless have agreed to these jurisdictional
14 allocations and in cross-examination at the hearing,
15 Mr. Scheperle indicated that he issued data requests
16 to Western Wireless only because Mr. Williams had not
17 specifically stated that Western Wireless was
18 agreeing to the jurisdictional allocations in his
19 pre-filed direct testimony, so all of Mr. Scheperle's
20 testimony, all of Staff's testimony concerning
21 gathering information from the wireless carriers and
22 from the local exchange carriers is really surplus at
23 this time.

24 The wireless carriers and the local
25 exchange carriers have negotiated and agreed to

1 appropriate jurisdictional allocations. Now, I'm not
2 -- I agree with what Mr. England told you about the
3 -- why these percentages are reasonable, but to -- I
4 suppose as additional support for that and in
5 response to Chair Gaw's question as to whether the
6 agreement between the wireless carriers and the
7 Complainant local exchange carriers should be given
8 weight, I think -- I agree with Mr. England that
9 there really is no binding precedent, there are no
10 judicial decisions or decisions from the Federal
11 Communications Commission that are on point, but I
12 suppose by analogy, I could point you to the
13 provision of the Telecommunications Act which governs
14 your review and approval of interconnection
15 agreements.

16 That's Section 252(e) (1) of the
17 Communications Act, which says in effect, that
18 negotiated interconnection agreements may be rejected
19 only if they are determined to discriminate against
20 nonparties or if they are contrary to the public
21 interest. We believe that certainly the public
22 interest aspect of it is -- is met by the fact that
23 this was a negotiated agreement.

24 The Communications Act very clearly
25 supports negotiation -- negotiated resolutions of

1 these issues, and that's precisely what we're
2 presenting to you today. With respect to whether
3 there's any discrimination, the only company that --
4 or the only entity that appears to claim that it
5 could possibly be discriminated against is
6 Southwestern Bell, and in this case, and of course
7 Bell is not a party to what, you know, you could view
8 as the negotiated resolution of this dispute, but
9 Bell is protected. Bell isn't discriminated against.

10 The indemnification, which appears in
11 its tariff and in the interconnection agreements
12 between Southwestern Bell and my clients fully
13 protects Southwestern Bell and would render, in
14 effect, any claim that it's being discriminated
15 against.

16 So, you know, in closing, you know, I
17 see no reason to repeat what Mr. England has already
18 told you. I agree with him that the negotiated
19 percentages of traffic between interMTA and intraMTA
20 is appropriate, it is supported by evidence in the
21 record, and we urge its adoption by the Commission.

22 JUDGE THOMPSON: Thank you, Mr.
23 Johnson. Questions from the Bench. Chairman Gaw.

24 CHAIRMAN GAW: No, thank you.

25 JUDGE THOMPSON: Commissioner Murray.

1 COMMISSIONER MURRAY: I have one or
2 two.

3 MR. JOHNSON: Certainly.

4 COMMISSIONER MURRAY: In the what you
5 cited about the nondiscrimination against Bell.

6 MR. JOHNSON: Right.

7 COMMISSIONER MURRAY: Because you said
8 the indemnification clause fully protects them, would
9 there be cause of collection if they --

10 MR. JOHNSON: Well, there certainly
11 could be, and I believe that -- I believe it was
12 Commissioner Clayton who asked at the hearing as to
13 whether the interconnection agreements carried --
14 included the collection of attorney's fees. I
15 believe Commissioner Clayton asked about that.

16 I don't believe they do in specific
17 terms, so I believe there would be cost of
18 collection, but candidly, that is the American
19 system. If we were in Great Britain, costs of
20 collection would be automatically given to the
21 prevailing party.

22 If Southwestern Bell had felt that
23 costs of collection were something that were
24 important to it, it could certainly have attempted to
25 negotiate it into the interconnection agreements, for

1 whatever reason, it is not.

2 Now, I don't have their tariff in front
3 of me. I don't know whether the tariff includes
4 costs of collection, perhaps Mr. Bub, who's probably
5 more of an expert on the tariff than I, could address
6 that.

7 COMMISSIONER MURRAY: And is there a
8 time value on the money that --

9 MR. JOHNSON: There's no question there
10 is, but I believe that the tariff, and I know, you
11 know, Mr. England indicated that his clients' tariffs
12 include late payment fees and costs of collection.
13 Whether the Southwestern Bell tariff as well includes
14 those, I don't know, perhaps Mr. Bub could respond to
15 that.

16 COMMISSIONER MURRAY: Thank you.
17 That's all I have, Judge.

18 JUDGE THOMPSON: Thank you
19 Commissioner. Commissioner Forbis.

20 COMMISSIONER FORBIS: No.

21 JUDGE THOMPSON: Commissioner Clayton.

22 COMMISSIONER CLAYTON: I just want to
23 say attorney's fees are always very important.

24 MR. JOHNSON: Well, I understand the
25 question, I understand the point.

1 JUDGE THOMPSON: I have a couple
2 questions for you, Mr. Johnson.
3 MR. JOHNSON: Yes, Judge.
4 JUDGE THOMPSON: Can you give me a
5 ballpark figure for the amount that is unpaid and
6 owed by your clients?
7 MR. JOHNSON: I can give you a ballpark
8 in terms of orders of magnitude. My understanding is
9 that T-Mobile owes several hundred thousand dollars,
10 and Western Wireless owes something in the tens of
11 thousands, and Mr. England probably has those figures
12 at his fingertips.
13 JUDGE THOMPSON: Okay. Thank you.
14 MR. JOHNSON: Thank you.
15 JUDGE THOMPSON: Oh, excuse me.
16 MR. JOHNSON: I almost got away.
17 CHAIRMAN GAW: You didn't ask the next
18 question.
19 JUDGE THOMPSON: Which is how come they
20 haven't paid?
21 CHAIRMAN GAW: That's it. Are they
22 going to be paid and what's involved in that? Do you
23 want to address that?
24 MR. JOHNSON: That's a fair question,
25 and I suppose the easy answer for me would be I've

1 not been involved in negotiations, but that's not a
2 fair answer to your question. My client has, gosh,
3 and I don't want to violate the attorney/client
4 privilege.

5 CHAIRMAN GAW: Well, only to the extent
6 you can give me the answer.

7 MR. JOHNSON: I understand.

8 CHAIRMAN GAW: I'm not trying to get
9 you to do something would jeopardize that
10 relationship.

11 MR. JOHNSON: Well, I could say one
12 issue for my client has been that, or all of the
13 clients that I represent, is that they were not
14 parties to the litigation that has gone, you know,
15 gone up to the Court of Appeals and come back, so I
16 guess to the extent that there has not been a
17 Commission decision that is quote binding on it, if
18 you will, binding on them, if you will, my clients
19 have said that they wanted to litigate this process.

20 JUDGE THOMPSON: Commissioner Clayton.

21 COMMISSIONER CLAYTON: Just one
22 question. On that attorney's fees question, you
23 mentioned that in the American system that attorneys
24 fees generally would not be payable in this sort of
25 collection action. Do you believe if the Commission

1 were to decide this liability question and place
2 language in for indemnification to Southwestern Bell
3 from your clients, do you believe the Commission has
4 the ability in our Order to order the payment of
5 collection costs?

6 MR. JOHNSON: I don't believe you do.
7 I don't believe you have that power. Actually, Judge
8 Thompson, I'm sorry, Judge Clayton, I wanted to
9 address one question that you had of Mr. England, and
10 that had to do with the secondary liability issue.

11 I think -- I've looked into this issue
12 in other contexts in the past. The general rule in
13 Missouri, when you're talking about a primary claim
14 and a secondary claim, is that if the primary claim
15 is fully and honestly litigated, then the guarantor,
16 if you will, does not have the right to relitigate
17 the underlying claim. However, if there is proof of
18 collusion between the -- with respect to resolution
19 of the primary claim, then the guarantor may, at
20 least attempt, to relitigate the underlying claim.
21 That's my understanding generally speaking of
22 Missouri law on the secondary liability issue.

23 JUDGE THOMPSON: Okay. Thank you.

24 MR. JOHNSON: Thank you.

25 JUDGE THOMPSON: Did that answer your

1 question?

2 COMMISSIONER CLAYTON: I think so.

3 JUDGE THOMPSON: Yes, ma'am.

4 COMMISSIONER MURRAY: Are you aware of

5 any situation in which a party is held to be a

6 guarantor without voluntarily agreeing to do so?

7 MR. JOHNSON: No, I believe the

8 guarantee is a matter of contract, and therefore,

9 just under basic contract law. A guarantee cannot be

10 imposed without the consent of the putative

11 guarantor.

12 COMMISSIONER MURRAY: Thank you.

13 JUDGE THOMPSON: Further questions from

14 the Bench? Chairman Gaw.

15 CHAIRMAN GAW: Well, just to follow

16 that up. That's why I'm having some trouble with the

17 guarantor analogies. Where is the consent from Bell

18 to be a guarantor if you're using that analogy?

19 MR. JOHNSON: Well, the consent --

20 CHAIRMAN GAW: I'm not suggesting it

21 has to be, but because the analogy has been made with

22 the guarantor, I'm just wondering if you all are

23 tracking, I know the Judge sort of started this, but

24 you all are tracking the analogy to that extent, and

25 if so, where was the consent, and if not, maybe

1 you've got a different analogy.

2 MR. JOHNSON: Chairman, I suppose for
3 lack of a better word, I think the issue of secondary
4 liability is a red herring. Southwestern Bell, I
5 mean, this isn't necessarily my client's interest to
6 say this, but I believe Southwestern Bell is fully
7 protected here. It's done a very good job through
8 its tariff and interconnection agreements, it's done
9 a very good job of covering itself, and so I think
10 candidly Southwestern Bell's objections here are
11 nothing more than a red herring.

12 JUDGE THOMPSON: Unless, of course, the
13 primary debtor, for lack of a better word, is unable
14 to pay.

15 MR. JOHNSON: I suppose that's true,
16 but I don't think -- there's certainly nothing in the
17 record that my clients are insolvent.

18 JUDGE THOMPSON: Okay. Further
19 questions from the Bench? Hearing none, you're
20 excused. Thank you very much.

21 MR. BUB: Good morning. My argument
22 will be in three parts. The first is going to focus
23 on Complainant's claim against SBC. The second is
24 going to focus on their claim against T-Mobile and
25 Western Wireless, and the third part will focus on

1 the factor issue and Commissioner Gaw's questioning
2 concerning the dynamic on the nonunanimous
3 stipulation and Federal Act.

4 First, I'd like to take the secondary
5 liability question head on since we've been talking
6 about that for the last 10, 15 minutes, and I need to
7 tell you that I have a real problem when T-Mobile and
8 Western Wireless get up here and say that SBC is
9 fully protected, that liability against us is just
10 theoretical, that the issues that we raise here in
11 defending ourselves is just a red herring.

12 You're hearing him say all that, but
13 when you asked him if you're ordered to pay and
14 don't, and then secondary liability is order against
15 SBC, will you pay. You didn't hear him say that they
16 would, and I believe Judge Thompson asked that same
17 question to their witness, and let me note that I
18 passed out a binder, and I'm going to have a lot of
19 references in my argument to passages in the binder,
20 and just to go through it really quick, the first
21 couple of tabs, that's our initial reply brief, as 3,
22 4, and 5 are excerpts to the record. Tab 6 and 7 are
23 two cases that is I'd like to discuss.

24 If you would turn to, I believe it's
25 Tab 3, Page 125 that's the box on the top right,

1 Judge Thompson, Line 1, so if Bell winds up having to
2 pay any part of that, meaning that liability in this
3 case, would your employer, so far as you know, be
4 willing, then, to reimburse Bell, since you've agreed
5 they ought to be paying for it. What was his answer?
6 That's a legal issue I can't answer. He didn't agree
7 to pay for it either, so I would submit to you that
8 the liability that we have here isn't merely
9 theoretical or red herring, and we're not fully
10 protected.

11 If secondary liability imposed on us,
12 what you see here is what we'll get, another lawsuit.
13 We'll either be back here trying to collect it from
14 Western Wireless or in court trying to collect it
15 from Western Wireless and T-Mobile, and I don't think
16 that's, further, any party's interest and it
17 certainly wouldn't further the interest of stability
18 in this industry.

19 As you heard Mr. England say that
20 tariffs -- that his clients have filed wireless
21 termination tariffs. They're working. All of the
22 small LECs in Missouri, except for three, and it's
23 their choice not to file it, but all the small LECs
24 have wireless interconnection, excuse me, wireless
25 termination tariffs. All the wireless except for

1 T-Mobile and Western Wireless are paying.

2 If you'll look how much it's at issue
3 here, I think Mr. Johnson characterized it as a
4 couple hundred thousand for one of his clients, in
5 the tens of thousands for another, so just two
6 wireless carriers in Missouri. There are several
7 others and much bigger; Cingular, Sprint PCS, Verizon
8 Wireless, AT&T Wireless, they're all paying, so if
9 you can imagine the volume of traffic that's coming
10 through our network to theirs, they're getting paid
11 significant amounts of money.

12 What they're asking us here basically
13 either in being their secondary liability person is
14 to be their fall guy for their bad debt. Bad debt is
15 just a regular part of doing business in any
16 business. I'm not saying that they shouldn't get
17 paid. They're certainly entitled to get paid for
18 every minute they terminate, but it should be from
19 the proper party. If that proper party, the wireless
20 carriers in this case, don't pay, what you need to do
21 here is to get them back on the ranch and get them to
22 pay.

23 We had some discussion about the way
24 our American justice system is. The way I understand
25 it and understand Missouri law, if a tariff at the

1 Commission's approved is objectionable to some, they
2 have an opportunity, one of the tariffs to oppose it,
3 and if they lose, they can take it to court, both
4 county circuit court or appellate court, and that was
5 done in this case including. Various wireless
6 carriers, including my affiliate Cingular. They did
7 that. They took it to the Court of Appeals and they
8 lost, but they're paying now because that's the law.
9 There's no reason here why Western Wireless and
10 T-Mobile should not be paying.

11 The tariffs that are before this
12 Commission have been forced in effective law and they
13 need to be paid. They can make out some type of an
14 arrangement, if they wanted, to perhaps put in escrow
15 so this issue can be litigated in some other form,
16 they haven't even done that. They haven't asked --
17 they haven't gone to any other court, there's been no
18 stay issued, so the tariff that's before this
19 Commission is lawful and they just need to pay it and
20 make that very clear to them.

21 Mr. England talked about the reason why
22 we should be secondarily liable, SBC should be
23 secondarily liable. I'd like to talk about that for
24 a minute. What he's pointing you to is a case that
25 was issued over five years ago, probably six, in

1 another case that involves significantly different
2 circumstances of those that exist here. Let's go
3 back to the other case that he described to you.

4 In that case, most of the traffic that
5 we had was coming under our tariff. It was -- we
6 changed our wireless interconnection service tariff
7 so that it would be a transiting-only tariff, and as
8 Mr. England described the last time we were together
9 here during his argument, he saw that as your
10 approval of our tariff for transiting as a regulatory
11 compact and agreement under which we would be allowed
12 to provide transiting if we had secondary liability.

13 Well, what were the other circumstances
14 in that case? We need to look at those, because in
15 that case, they opposed our tariff, but the primary
16 -- one of their primary opposition points was that
17 this traffic was coming to them and they had no
18 control over it. They couldn't stop it and they
19 couldn't block it. We were the only ones that had
20 that ability.

21 I think it was characterized as a
22 hammer over leverage, and I'll tell you, in our
23 tariff, we had that. We had the ability to terminate
24 service for unpaid amounts, and that leverage would
25 have applied to secondary liability as well. They

1 asked for blocking in that tariff case, and you told
2 them no. Instead, you gave them secondary liability.
3 Well, a lot has happened in those intervening five
4 years.

5 They came forward and filed wireless
6 termination -- tariffs, and in those tariffs, they
7 asked again for the ability to block, made the same
8 argument. In this case -- excuse me, in that
9 wireless tariff case of theirs, you gave them
10 blocking. You gave them the ability to direct us to
11 block a wireless carrier's traffic to them in
12 situations where the wireless carrier cannot pay.

13 Now, I freely admit that we didn't like
14 it in that tariff case, but we didn't appeal it. We
15 accepted that, and they've asked us to do blocking in
16 a couple of cases and we have, and we will in the
17 future, so it's a very effective remedy, and one
18 thing that's ironic now, our traffic is coming under
19 interconnection agreements.

20 As you heard our witness, Allen Kern,
21 testify, over 99 percent of our traffic from wireless
22 carriers comes under interconnection agreements, and
23 that's simply because the rate is so much lower and
24 it gives compensation where the tariff did not.
25 Under interconnection agreements, we don't have the

1 ability to block the traffic even when they don't pay
2 us. What we have is dispute resolution.

3 There's two categories of dispute
4 resolution. The first is if it's under \$25,000, then
5 the parties are to appoint knowledgeable executives
6 from either side to try and sit down and work it out,
7 and if they can't, then that dispute is referred to
8 the American arbitration system. If it's over that,
9 there isn't a resolution mechanism. We can either
10 come here or to court.

11 So in this particular instance, if we
12 were held secondarily liable for any of the traffic
13 in dispute here, we would not be able to take out
14 some big hammer and make Voicestream and Western
15 Wireless pay under the threat of all their traffic
16 being disconnected. We just don't have that ability.

17 We don't even have the ability to say
18 if you're not paying the small LECs in this case, we
19 can't even block traffic to the small LEC exchanges
20 without the small LECs telling us to, so in this --
21 it's ironic now that they're the ones with the hammer
22 and we don't.

23 That regulatory bargain, that
24 regulatory compact that Mr. England discussed with
25 you the last time we met has significantly changed.

1 You've given them the remedy that they wanted, and
2 you gave it to them without any strings attached, and
3 in that case, when they were asking for blocking,
4 when they were asking for wireless termination
5 tariffs to be approved, not once did they mention
6 that they wanted secondary liability. Not once. So
7 I would submit to you that in this situation, under
8 the -- under the present circumstances, the case that
9 Mr. England cited on wireless interconnection service
10 tariff case has no application here.

11 Staff also supports this view. If you
12 look in their testimony, I think they do a very good
13 job of explaining why Complainants' secondary
14 liability claim just doesn't hold water.
15 Essentially, in their testimony, they explain the
16 secondary liability that the Commission imposed in
17 its '97 Order approving the SBC wireless termination
18 tariff. It responded to a prestige imbalance that
19 just doesn't exist anymore, as I explained.

20 Staff further explains in its testimony
21 that these tariffs at the small LECs have now
22 provided a complete solution. Now when the wireless
23 carriers send their traffic through our network or
24 any other tandem company's network to the small
25 ILECs, the wireless carriers have three choices and

1 they're mutually exclusive.

2 If you read your order, they can pay
3 the tariff rates. If they don't like those rates,
4 they can negotiate individual interconnection
5 agreements, and if they do neither, then their
6 traffic will be blocked, but that's solely at the
7 option of the small ILEC.

8 If you turn to Tab 4, that's some
9 excerpts from the hearing we had from Mr.
10 Schoonmaker's testimony, if you look at Page 253, I
11 believe it's the last page under Tab 4, Line 6 of
12 253, it identifies three small LECs; Goodman, Seneca
13 and Ozark. They came to us asking us to block. It
14 was T-Mobile's traffic. They weren't being paid, and
15 when they asked us to block, they asked the way
16 procedurally, they asked us how much it was going to
17 cost. In that case, we told them it was \$400. Mr.
18 Schoonmaker couldn't confirm that exact amount, but
19 it was in the ballpark.

20 It is reasonable enough that they
21 accepted it and directed us to block and we
22 implemented a block, basically built a computer
23 screening table, and we advised the wireless carrier
24 that we were going to do it.

25 As Mr. Schoonmaker indicates at Line

1 11, he agreed that as a result of that pressure,
2 negotiations got serious. Line 14, it lead to the
3 real life interconnection agreement between those
4 three companies, and that's been filed and approved
5 with the Commission, so this remedy that they have of
6 blocking isn't theoretical, it's real, we'll do it,
7 and I need to tell you it's something that we don't
8 normally do in the ordinary course of business.

9 Any telephone person will tell you that
10 the goal is to get the calls connected. When you
11 tell us to block, it's something that goes against
12 our grain, and it took us awhile to get used to, but
13 since you've ordered it, we've accepted it, and we're
14 approaching it as more of a service that we're going
15 to offer, only when authorized by the Commission, to
16 another carrier, and we've looked at it, developed
17 methods to make it reasonable, and in this case, we
18 looked at it and figured out how much it would cost
19 to block here, so it's not something that you have to
20 worry about if we leave this case without opposing
21 secondary liability that we'll stop blocking. The
22 only reason we would not block is if you told us not
23 to. If you stayed that, or if a court of competent
24 jurisdiction stated.

25 After the hearing and the briefs have

1 been filed, it should be clear, if you look at their
2 tariffs, that there really is no authority here for
3 imposing liability either for intra or interMTA
4 traffic on SBC. I could point you to a few pages in
5 our company's initial brief, it's under Tab 1, Page
6 7, we outline why we think their tariff is.

7 If you look at the language that we
8 have here, by the very terms, there's no
9 authorization to charge us, the transit company.
10 These tariffs, by their terms, apply only to the
11 wireless tariffs, excuse me, to the wireless
12 carriers. If you look at Section B, we quote
13 subsection one it states this service is provided to
14 Commercial Mobile Radio Service (CMRS) Providers
15 licensed by the FCC. Nowhere in the tariff does it
16 state that the service is provided to the transiting
17 carriers.

18 Later on, another quote telephone
19 company shall issue a bill to CMRS provider. Again,
20 nowhere in the tariffs does it state that the
21 Complainants could bill the transiting carrier.
22 Subsection 5, same section, the CMRS provider shall
23 pay. No where you does it state the transiting
24 company shall pay.

25 And in fact, when Chair Gaw asked Mr.

1 England how the tariff describes a secondary
2 liability they're trying to impose on SBC, Mr.
3 England had to acknowledge that it's really not on
4 the tariff, and you'll find that on Page 210, Line
5 23.

6 JUDGE THOMPSON: Which tab is that?

7 MR. BUB: Your Honor, I have to
8 apologize, I did not get that in mine, but it is
9 there, and I can make a copy of that page if you need
10 it.

11 JUDGE THOMPSON: That's okay.

12 MR. BUB: It's Page 210, Line 23.

13 JUDGE THOMPSON: Okay.

14 MR. BUB: When Complainants,
15 approximately three years ago, they didn't disclose
16 any intent at all to impose secondary liability.
17 They represented the tariffs only as a client to
18 wireless carriers.

19 I have a quote from the middle of Page
20 8 from Mr. Schoonmaker tariffs proposed at a single
21 rate increment be charged to the wireless carriers
22 for terminating their traffic. Plaintiffs' Counsel,
23 during his opening statement, made similar
24 representations. Nowhere in any of these remarks
25 either the witness or counsel was any intent

1 expressed to the charges contained in the tariff
2 would ever be imposed on a transiting carrier. There
3 was only one instance in the entire case on Pages 8
4 and 9, and that's a situation where the wireless
5 carrier wasn't paying, small LEC asked us to block
6 and we refused.

7 In that instance, they said we should
8 have secondary liability, that we should be made to
9 pay, and the quote there is -- their position
10 statement on Issue 3(b), the last line, if the ITP,
11 which is the, at that time, at that case we were
12 talking about intermediate transport provider, or a
13 different label is transiting carrier, but it's the
14 same thing, if the ITP does not block traffic, then
15 the ITP should be held responsible for the traffic.
16 That's the only time in that case when they presented
17 their tariff to you that they said we should have to
18 pay.

19 And as it's clear in this case, none of
20 the small LECs have asked us to block the wireless
21 traffic, so even if this exception did provide some
22 basis from imposing liability on us, it doesn't apply
23 here because they never asked us to block, and that
24 gets into another point that you really need to
25 consider and decide whether to impose secondary

1 liability or not. We have no control over when that
2 traffic will be blocked.

3 In this case, after a month or two of
4 nonpayment, they have come to us and said, hey, we're
5 not getting paid, please block the traffic, we would
6 have, and that would have capped the liability then
7 and there at some place way south of these hundreds
8 and thousands of dollars. It was their own business
9 decision. They decided they were going to go forward
10 and litigate it here and try to get attorney's fees
11 and costs. We had no input or say so into that
12 decision. It was completely beyond our control, and
13 as a result, this case has gone on, the bill, the
14 tab, has continued to increase.

15 Why should they care if they have
16 secondary liability? We care when we have no ability
17 to cap that. We have no ability to stop the tab. We
18 have no ability to stop the tab from being run up.

19 Let's look now at the interMTA traffic.
20 First, note the Complainants have cited any provision
21 of their access tariff that proposes any liability on
22 the transit or transport provider. That's because
23 there aren't any, and it's clear from the face of
24 their complaint.

25 If you look at Paragraph 28 of their

1 complaint, the Complainants allege that T-Mobile and
2 Western Wireless are subject to the access tariff,
3 but they made no such allegations against SBC, the
4 transit carrier, and if there were any doubts about
5 how Complainants' access tariffs should be applied,
6 all doubt should be erased after Mr. Schoonmaker's
7 testimony in this case.

8 When discussing this type of traffic
9 with Judge Thompson, Mr. Schoonmaker agreed that
10 interMTA traffic is just simply plain old long
11 distance traffic. That reference is under Tab 4,
12 Page 104, Lines 21 to 24, bottom left-hand corner of
13 that page, plain old long distance traffic.
14 Would you agree that interMTA originated traffic is
15 simply plain old long distance traffic? Yes.
16 Subject to access? Yes.

17 We agree with that. And how is plain
18 old long distance traffic handled when more than one
19 LEC is involved in terminating that long distance
20 call? Complainants' access tariffs, by all access
21 tariffs of local exchange, provide for the joint
22 provision by LECs in Missouri of exchange access
23 services. That's what Mr. Schoonmaker said, if you
24 look at the bottom of Page 64, again, under Tab 4.

25 It is referencing the Oregon Farmers

1 tariff, which is the access tariff that most of the
2 Complainants concur in. These are the tariffs that
3 contain the rates that would apply to the interMTA
4 traffic in this case; is that correct? That's
5 correct. Would you agree with me these tariffs
6 provide for the joint provisioning by LECs in
7 Missouri of exchange to access to other carriers?
8 I mean, in general, yes.

9 A little further down on Line 7, on
10 Page 65, up at the top right-hand corner of the page,
11 this generally means that if another carrier, like
12 AT&T, wants to terminate a long distance call to a
13 small LEC like Lathrop but doesn't have the
14 facilities that go there, AT&T connects that call
15 through another LEC like SBC? Yes. And in that
16 instance, both SBC and the small LEC will be jointly
17 provisioning exchange access service? That's
18 correct.

19 Later down on Line 23, asked about the
20 billing arrangements. There are meet-point billing
21 provisions here in Missouri. I mean, there are
22 several different alternatives of meet-point billing
23 here in Missouri. They bill using a multiple bill,
24 multiple tariff method, which means that each company
25 bills their representative portion out of their

1 representative tariffs. A lot of work by all LECs
2 went into implementing meet-point billing in
3 Missouri. A long time ago, yes.

4 A few pages later, I believe it's Page
5 68, we go through an example of how that works.
6 In that situation, we have a call going from Kansas
7 City customer OF SBC that would choose AT&T for that
8 long distance call. In that situation, the call
9 would go from customer's premise to AT&T, their
10 chosen carrier, across the LATA. In this particular
11 instance, we're having the call terminate in Orchard
12 Farm, which is north of St. Louis, so that call would
13 come into out tandem in the St. Louis LATA, and that
14 would run our facility out to Orchard Farm and
15 Orchard Farm would terminate it.

16 At the bottom of Page 68, would you
17 agree with me that this is not an uncommon occurrence
18 to have a call carried by an interexchange carrier
19 and then two or more LECs that are involved in the
20 termination of that call? I would agree that that's
21 not uncommon.

22 Happens frequently, does it? Yep,
23 every day.

24 And that's because Orchard Farm, in
25 this example, doesn't have a tandem facility

1 themselves? Yes, and the interexchange carrier
2 chooses to come tot he tandem, not to Orchard Farm
3 directly.

4 And of the independent companies in
5 Missouri, would you agree that the majority of those
6 don't have their own tandem, so that -- so they
7 receive terminating interexchange calls that require
8 the involvement of two or more LECs, like in the
9 example we've just discussed? That would probably be
10 true of the majority of it.

11 Would you agree with me that the Oregon
12 Farmers access tariff contemplates the meet-point
13 billing that we discussed earlier? Yes.

14 And under that billing arrangement,
15 Orchard Farm bills directly to AT&T, the
16 interexchange carrier, and not to SBC?

17 Think about that. Small -- most of the
18 small LECs don't have their own tandems.
19 Interexchange traffic that comes to them, comes
20 indirectly. Think of the volume of traffic. Think
21 of the amount of money that's exchanging hands as a
22 result of those transactions that are enabled by
23 these direct connections.

24 Put it in plain, simple terms. Using
25 direct interconnections are bringing in business, a

1 lot of business. We have two carriers here that
2 aren't paying, that's not a reason to impose
3 secondary liability. They just need to be brought
4 back to the ranch.

5 The system that we have worked out
6 among the carriers is for long distance, it's been
7 there for years, and it works. Sometimes
8 interexchange carrier don't pay, there are ways to
9 handle that, so under the tariff, we can collect.
10 Same thing ought to happen here with the wireless
11 carriers.

12 Judge Thompson, I think this area -- he
13 inquired deeply into this area. I'd like to direct
14 your attention to Page 92, still under Tab 4. He
15 asked what the joint provisioning is -- of exchange
16 access is. Mr. Schoonmaker's answer. Basically the
17 joint provisioning is recognizing that an
18 interexchange carrier who connects at the Bell tandem
19 and wants to terminate traffic to Orchard Farms
20 Telephone Company, which we talked about in the one
21 example, it takes the facilities of both Southwestern
22 Bell and Orchard Farms in order to get that call to
23 the ultimate end user where it's terminated. And
24 they, therefore, jointly provision the termination of
25 that call, each of them providing a portion of the

1 facilities necessary to make it happen.

2 Judge Thompson asked him a question
3 about, well, in that situation, would you bill some
4 of the charges -- would the small LECs bill some of
5 the charges against Southwestern Bell and some
6 against the IXC. Was that your testimony? No. The
7 joint provisioning means that both Southwestern Bell
8 and Orchard Farms are providing part of the service,
9 and they each -- under the meet-point billing
10 provisions which were mentioned, Southwestern Bell
11 would bill for their facilities, which would be a
12 transport charge between their switch and a meet
13 point with Orchard Farms, meet-point where the
14 facilities actually meet, possibly a tandem switching
15 charge.

16 At the top of Page 93, and then Orchard
17 Farm would build the transport from the meet point
18 with Southwestern Bell to their switch, talks about
19 -- goes on to talk about the different elements, but
20 I don't think we need to get into that, except that
21 the access elements in those constitute the access
22 services being provided to terminate that long
23 distance call.

24 Later at the top of 94, at the bottom
25 right-hand corner of that page, Judge Thompson

1 inquired about the legal basis for this type of
2 billing. His question was: Now, what -- if you
3 know, what governs this meet-point billing from a
4 legal point of view or from a tariffed point of view?
5 In other words, does Orchard Farms' exchange access
6 tariff determine who pays what in the call that's
7 provisioned in this example?

8 Mr. Schoonmaker's answer: Both
9 Southwestern Bell's and Orchard Farms' access tariff
10 have provisions for the provision of exchange for
11 access service and both of them have provisions for
12 this joint provisioning and meet-point billing, so
13 they both apply each to the facilities that that
14 particular company provides in regards to that
15 service.

16 You're probably wondering how this
17 applies to interMTA wireless traffic. Those examples
18 that we went through were land-line calls. So was
19 Judge Thompson. Look at the top of Page 98. Again,
20 to Mr. Schoonmaker. Let's say that traffic is
21 interMTA traffic and that there is an interconnection
22 agreement between Bell and the wireless company and
23 there is no interconnection agreement between the
24 wireless carrier and small ILEC in the situation
25 here.

1 In that case, do you -- is it your
2 professional opinion that the exchange access tariff
3 of the small ILEC would govern? Yes. In regards to
4 the interMTA traffic, it would. And in fact, in
5 Bell's interconnection agreement, their
6 interconnection agreement says if it's interMTA
7 traffic, they may define it and use different
8 percentages or something. We may have a different
9 factor than the small ILECs, but if it's interMTA
10 traffic, I believe under Bell's interconnection
11 agreement, it certainly generally is, and in the
12 early ones it was, their access tariff would apply to
13 that interMTA traffic as well, rather than the rates
14 in the interconnection agreement.

15 Plain old long distance traffic that
16 should be handled the exact same way. To avoid
17 belaboring this point much further, I'd just like to
18 point out that there are other examples of calls that
19 we went through with Mr. Schoonmaker, and you could
20 find those at Pages 70 to 77. In each case, when
21 more than one LEC was involved in terminating the
22 call, both the transiting, or transport, and
23 terminating LEC, both of them that were involved in
24 the call, they billed the carrier that was providing
25 the long distance service. In no case did the

1 terminating LEC bill a transiting LEC.

2 I'd also like to point out that this
3 meet-point billing concept, where I bill from mine,
4 small ILECs behind us bill for theirs, that concept
5 is what the Complainants used as a model for they're
6 wireless tariffs. Let's look at Page 97, Line 7.
7 This is Mr. Schoonmaker, again. And under our view
8 today, the Bell interconnection agreement would apply
9 to their portion of it, which Bell calls transiting
10 in this environment. And we believe the wireless
11 terminating tariffs apply to Orchard Farms' portion
12 of it, and then it goes on to say Orchard Farms'
13 isn't a Complainant here, but BPS is, and it's the
14 same idea. In this case, it makes it clear that
15 T-Mobile should be paying the tariff rates.

16 We think it's pretty clear here when
17 talking about liability to SBC that there isn't any,
18 either under secondary liability theory, under a case
19 decided over five years ago under significantly
20 different circumstances, or under the tariffs that
21 they applied -- that they're trying to apply here,
22 there's no authority to hold the secondary liability.

23 I'd also like to point out that such a
24 ruling in this case holding that there's no secondary
25 liability on the part of the transit carrier, that

1 would be well supported. The FCC rulings, I pointed
2 some out and these would be under Tab 1 on Pages 11
3 through 13 of my initial briefing, and I won't go
4 into those here, but they're there for you to see.

5 It's also consistent with your own
6 rulings refusing to impose liability for terminating
7 charges on transit carriers. You've ruled that in
8 case 99-254 when the primary toll carrier plan was
9 eliminated. You also ruled in the 99-593 cases,
10 which is the case involving records signaling
11 protocols, trunking that the Commission established
12 after the elimination of the primary toll carrier
13 plan.

14 In those cases, small LECs asked
15 the transit carrier be held responsible for all the
16 traffic that passed through. You're probably more
17 familiar with the euphemism that they wanted to
18 change the business relationship. Each time they
19 brought that to you, you declined. You refused to
20 apply that.

21 This is also consistent with some
22 decisions in another neighboring states, and for
23 this, I'd like to point to you Tab 6, which is a
24 decision from the Iowa Corporation Commission, and I
25 am not going to belabor that in detail, but just to
26 point you to a reference.

1 When you read through this case, you
2 need to know who the parties are. To set it up, it's
3 a similar case where you have wireless traffic coming
4 through another Bell operating company, in this case,
5 it was Qwest, and instead of going directly to a
6 small ILECs like they do here, they have a consortium
7 of Iowa network systems, which I believe the
8 Commission in that case analogized them to providing
9 a LEC exchange access function, and then you had the
10 INS Participating Telephone Companies.

11 They call them PTC's there, they're not
12 like our PTC's. Those are small LECs that form that
13 Iowa network system, so the call path would go
14 wireless carrier, Qwest, this Iowa network system or
15 INS, and then to the INS Participating Telephone
16 Company, or to their PTC.

17 The part that I cited to you, and these
18 are LECs' pages, so you would have to look for the
19 star number, but it's Star 16, it was Issue No. 1,
20 and essentially what they just -- the small ILECs in
21 that case were arguing that under some FCC authority,
22 this wireless traffic isn't subject to access charges
23 unless it's carried by an IXC, and in that case,
24 they're trying to make an analogy that Qwest was an
25 IXC because it was a transiting function.

1 The Iowa Corporation Commission flatly
2 blew that away. They say the INS and PTC
3 interpretation depends on Qwest being defined as an
4 IXC as meant by the FCC in Paragraph 1043. However,
5 it appears the FCC was referring to traditional
6 "long-distance" traffic delivered to the LEC by a
7 classic IXC, such as AT&T, which has a billing
8 relationship with the customer who initiates the
9 call. The FCC's analysis is not applicable to a
10 carrier in the position of Qwest occupies in this
11 case, where it has no end-user customer in the
12 transaction who can be billed for the costs Qwest
13 incurs to complete the calls.

14 Next paragraph. Additionally,
15 Paragraph 1043 refers to CMRS providers and not
16 intermediate carriers such as Qwest when it states
17 that -- this is in quote from the FCC -- "CMRS
18 providers continue not to pay interstate access
19 charges for traffic that currently is not subject to
20 access charges." The traffic at issue in this docket
21 is not Qwest's toll traffic and the function that
22 Qwest performs in its transit function is to provide
23 an indirect connection for local traffic. The FCC
24 has deemed intraMTA traffic local, and therefore
25 access charges do not apply.

1 I would also call the Commission's
2 attention to a brief that the Commission recently
3 filed with the Court of Appeals for the Western
4 District. Commission's argument is the appeal of the
5 498 case, the Alma complaint case. The Commission,
6 in its arguments before the Western District relied
7 on this case.

8 I'd also like to point you to the case
9 in Tab 7, and this will be a little easier because
10 you can go to the back and they have a chart, Exhibit
11 B to Report and Recommendations to the Arbitrator. I
12 thought I had a better cite than this. I might need
13 to provide it later. Here it is, I'm sorry. It was
14 Exhibit B, but it was a three-page exhibit. Under
15 Issue 1, what traffic within an MTA is subject to
16 reciprocal compensation. Arbitrator's decision is
17 that third column on the right. The Arbitrator
18 agrees with position of the CMRS Providers that the
19 FCC requires that reciprocal compensation be paid by
20 the originating carrier for all traffic exchanged
21 between the parties that is originated and terminated
22 within an MTA as determined at the beginning of the
23 call, and that case also, small ILECs asked SBC as a
24 transit carrier to be responsible.

25 In this case, the Oklahoma Corporation

1 Commission determined that it was originating
2 wireless carrier, not the transit carrier that was
3 responsible.

4 JUDGE THOMPSON: It might be a good
5 point to interrupt you, Mr. Bub, and ask you we're at
6 the point where we need to have a break for the
7 reporter at any rate, and the Commission holiday
8 lunch is beginning at 11:30, and I wonder if this
9 would be a good time to take a lunch break or would
10 you rather come back after the break for the
11 reporter?

12 CHAIRMAN GAW: Doesn't make any
13 difference to me. I would like to get -- this is a
14 prior here as far as I'm concerned.

15 MR. BUB: Your Honor, to cut it short,
16 I think I only have about two or three minutes left,
17 if that would help.

18 MR. BATES: Your Honor, if it would
19 help the Commissioners in making a determination, I
20 wouldn't anticipate being terribly long.

21 JUDGE THOMPSON: Okay. Why don't we go
22 ahead and take a five-minute break at this time and
23 return after that. We'll be in recess for five
24 minutes.

25 (A BREAK WAS HAD.)

1 JUDGE THOMPSON: We'll go back on the
2 record.

3 Mr. Bub, please proceed.

4 MR. BUB: Thank you, your Honor, I'll
5 be brief. The second point I just want to briefly
6 discuss the claim the Complainants have against
7 T-Mobile and Western Wireless. I'm really going to
8 shortcut this because that part of the case really is
9 open and shut, and I'm not going to go through
10 everything here under Tab 3, there's some bullets
11 from Western Wireless and T-Mobile's witness, Mr.
12 Williams.

13 In that case, he admits that the
14 traffic is their companies, that they transited
15 through our network, and that they terminated to
16 Complainants under the Complainants' wireless
17 termination tariffs, that's all you need to establish
18 liability, and that's clear.

19 You'll also see, I think that last
20 reference is Page 117, Line 13 through 15. You'll
21 also see that he's agreed that they are -- don't have
22 any dispute about the interMTA traffic, that they
23 agree that whatever is produced from the factor that
24 they agree to, that it's appropriately accessed, and
25 access rates, and those access rates would be due to

1 the terminating carrier, and that they would pay
2 them.

3 And to shortcut this, unless you want
4 me to give you references, it's in --

5 JUDGE THOMPSON: Can we find them in
6 here?

7 MR. BUB: You can find them in there.
8 There's two or three places that, I think, Judge, you
9 asked, Mr. Bates asked, and so did I, so there's
10 references there to that.

11 So I don't want to leave -- I don't
12 want to leave you with the impression -- any
13 impression that if you dismiss SBC in this case like
14 we've asked, that you will leave the Complainants
15 without a remedy.

16 They have the same remedy that they
17 have against any other carrier that doesn't pay, same
18 remedy that they've always had, and by allowing this
19 concept of secondary liability to exist, all it does
20 is create confusion and instability, so if you tell
21 them here and now there isn't any secondary
22 liability, they'll go after the proper party at
23 interest, and if they don't pay promptly, then they
24 can come to us, ask us to block, and we will.

25 The fees we have will be reasonable,

1 and if it's unreasonable, they can come to the
2 Commission and say it's an unreasonable fee and we'll
3 do the blocking and let the fee be up to you, but we
4 understand the blocking is important to the
5 Commission, to the functioning of their tariffs, so
6 we will do that.

7 With that, I'd like to go briefly to
8 the third point, and that's the factors. I agree
9 with Mr. England here that this -- in response to Mr.
10 -- to Chair Gaw's question from the hearing about the
11 dynamics between the nonunanimous stipulation and the
12 Act that there really shouldn't be any preferences,
13 it's a normal, nonunanimous stipulation, and here you
14 have to remember this complaint case.

15 What the Complainants are asking you to
16 do is impose liability on another party, on SBC. In
17 that situation, you're affecting the rights,
18 obligations and duties of another carrier, so it's a
19 contested case under Missouri law, and in order to
20 impose liability on us, your findings have to be
21 supported by substantial and competent evidence on
22 the record, and at least with respect to SBC, that
23 doesn't exist.

24 Wireless carriers, they've agreed to
25 the factors, they've agreed, so as far as whether

1 there's sufficient evidence to impose the factors on
2 them, they've already agreed to them. From our
3 perspective, there's not substantial and competent
4 evidence, and you can -- I will just point you to a
5 few sites. Mr. Johnson, in his opening statement,
6 Page 180, Line 17.

7 JUDGE THOMPSON: Which tab are we in
8 here?

9 MR. BUB: We're under Tab 3, I believe.
10 Yes. Tab 3.

11 JUDGE THOMPSON: Okay. Thank you.

12 MR. BUB: Line 17. Inherently
13 unreliable. Line 25, not specifically reliable and
14 the witnesses have agreed on that.

15 Let's go to Mr. Schoonmaker. He's
16 under Tab 4, Page 90. We sent him a data request and
17 he answered it and he read it into the record. The
18 statistical validity of the factors cannot be
19 determined. Go to Page 103, same tab, same witness,
20 Mr. Schoonmaker. This is a question from Mr. Bates,
21 it is at Line 5 through 8. He testified that in his
22 professional opinion, there was not any way now to
23 determine the inter or intraMTA nature of the
24 traffic. Page 105, Mr. Schoonmaker again, Line 7.
25 No way to know with certainty.

1 Go to Page 170, still under Tab 4, and
2 this is Mr. England, Line 16 through 21, it tracks
3 with what he told you in his closing argument today.
4 General agreement among all of the parties that there
5 is no data. The information, call records, whatever
6 you want to call it is available, currently available
7 that would identify what portion of this historical
8 traffic is interMTA and what portion is intraMTA.

9 There's also, I can give you some sites
10 and this is under Tab 3 to the wireless carriers'
11 witness, Mr. Williams. I'm sorry, it's his direct
12 testimony. I do not have that in the binder, but
13 it's Page 3 define -- that he says it's impossible to
14 forecast what percentage of future telecommunications
15 traffic will be interMTA or intraMTA, and that's at
16 Lines 20 through 21.

17 JUDGE THOMPSON: Go ahead and take your
18 time, Mr. Bub. We're not going anywhere.

19 MR. BUB: Similarly, Mr. Scheperle and
20 this is under one of the tabs. This is under Tab 4,
21 I'm sorry, Tab 5, Page 132, that's the bottom left,
22 Line 8 through 12, impossible to statistically
23 determine the accuracy of the factors. Line 13 to
24 17. Only way to actually know the true nature would
25 be to obtain cell site information and that wasn't

1 done here.

2 I'd also note that none of the
3 witnesses that support the factors were involved in
4 negotiation of preparation, and you'll find that in
5 Mr. Schoonmaker, Page 63, Line 1 through 2, and Mr.
6 Williams, Page 114, Lines 11 through 14.

7 So I submit to you here is that there
8 really isn't any basis to impose liability on SBC
9 here. You have sufficient evidence, tariff authority
10 to impose liability on Western Wireless and T-Mobile
11 wireless carriers here.

12 And you should. After all, it was
13 their customers' calls that are at issue here. We
14 merely provided the transiting function, which we do
15 for carriers all across the state for tremendous
16 volumes of traffic. We handle it no different.

17 We may call it transport or you may
18 call it transiting, but this indirect traffic, if you
19 can recall back to the railroad example that I gave
20 the last time we met, everybody's network doesn't go
21 everywhere, so to get to certain places, some in the
22 railroad example I think I had one in Jefferson City
23 that wanted to get to a point in Hannibal, hires
24 Union Pacific here to do it, their tracks don't go to
25 Hannibal, so the Union Pacific needs to get its

1 tracks over the terminal in St. Louis, which switches
2 the car, the boxcar, sends it up to Burlington
3 Northern's tracks, gets it to Hannibal.

4 Customer doesn't care how it gets
5 there, he just wants his boxcar of corn to be
6 delivered. It's up to us to do that. It's their
7 job. They have to bear all the expenses to get that
8 boxcar to Hannibal, so they have to bear their own
9 network. They have to pay the terminal railroad to
10 switch it, and they have to pay the Burlington
11 Northern to let the boxcar roll up its tracks.

12 Same thing happens in
13 telecommunications. Everybody's networks don't go
14 everywhere. Ours don't go everywhere. Sometimes
15 when we need to get a call to some of these small
16 LECs behind Sprint United, Sprint Missouri. We need
17 to transit it through Sprint. I think there's also
18 one small LEC that's behind Century, I think it's
19 Peace Valley. To get to those customers, we need to
20 transit.

21 We'll see a lot more than transiting as
22 other carriers interconnect. When you entrance the
23 wireless carriers, they gain considerable efficiency
24 with these indirect interconnections; otherwise, they
25 have to build their own railroad to go to all these

1 small ILECs, and you heard Mr. Schoonmaker testify,
2 interexchange carriers, the wireless carriers, don't
3 do that, and they look at how much traffic they have,
4 and if they have sufficient volume to go to a place,
5 then they build a line there, but most of the small
6 LECs don't have that amount of traffic that will
7 justify a separate line from their exchange carrier
8 or wireless carrier, that's why they use our
9 facilities.

10 As long as we don't have secondary
11 liability, as long as we get a compensable rate for
12 it, we don't object to the intransit carrier, but if
13 you impose liability disincentives on indirect
14 traffic, it will disincent carriers to share the
15 networks, and I don't think that's something we want
16 to have here in Missouri.

17 I think what we need is to get this
18 thing settled once and for all. Every carrier needs
19 to be responsible for collecting their own charges.
20 I'm not telling that you we'll sit and let something
21 happen, if we're asked to block, we will, if a small
22 LEC behind us doesn't know who to bill, they can call
23 us. We have an account manager that's dedicated to
24 the small ILEC, they can ask that gentleman and get
25 that information to them.

1 If they need to know about who is this
2 new carrier, they can call us, they can ask us. If
3 they're having trouble with a collection and they
4 need verification of records, we can do that. If in
5 this case, only sue the wireless carriers and wanted
6 us to come in and vouch for the records, we'd do
7 that, too. What shouldn't happen, though, is we be
8 made secondarily liable on traffic that is not ours.
9 And with that, I'll conclude. Is there any
10 questions?

11 JUDGE THOMPSON: Thank you, Mr. Bub.
12 Questions from the Bench? Chairman Gaw.

13 CHAIRMAN GAW: Thank you, Judge.
14 QUESTIONS BY CHAIRMAN GAW:

15 Q. Mr. Bub, your legal argument in regard
16 to the Commission's ability to move forward on the
17 nonunanimous stip, as I understand it, is that so
18 long as one of the parties isn't objecting, that we
19 have to look to the evidence to see whether or not
20 there is a record that supports the proposal on its
21 own, that the record has to show that there's some
22 reason why the Commission should find that that is a
23 proper conclusion.

24 A. I can give you a solution, your Honor.
25 We filed a Motion to Dismiss early in this case and

1 if you dismiss us out, we will not be a party, and
2 then that nonunanimous stipulation becomes a
3 unanimous stipulation, and even in this case, if you
4 hold that we have no secondary liability here, our
5 interest will be moot and I don't believe you need to
6 give any weight to what we say because we would not
7 have -- any interest would be mooted, but in order to
8 do that, you need to find that we have no secondary
9 liability or dismiss us out.

10 Q. In other words, the Commission has to
11 do what you want or else you believe there's nothing
12 in the record that will allow us to conclude that
13 what's proposed in that nonunanimous stipulation is
14 supported by anything in the record?

15 A. It's supported vis-a-vis the carriers
16 that agreed to them. You know, and we haven't, so.

17 Q. There isn't anything -- your argument
18 is that the testimony is that there is not sufficient
19 -- it's not a sufficient data to support the
20 percentages on their own barring this agreement,
21 isn't that --

22 A. Right.

23 Q. Maybe it's oversimplified.

24 A. They have to meet their burden of proof
25 because what they're doing with these factors is

1 qualifying for a higher rate that they want you to
2 impose on us, and to qualify for that higher rate,
3 they have to meet the burden of proof, at least
4 against us they haven't done that.

5 Q. If we were in that position barring
6 dismissing you from the case or not -- or
7 disregarding an earlier Order of the Commission
8 saying that there should be secondary liability
9 there, then if we're in that position, then how do we
10 get the data? How do we get the data to find out
11 what the traffic is?

12 A. I think in this particular case, it's a
13 complaint case, you would dismiss the complaint like
14 any other lawsuit or elements of the claim haven't
15 been proven, you would just dismiss it.

16 Q. Well, wouldn't we have to do traffic
17 studies of some sort?

18 A. Your Honor, the burden is on the
19 Complainants, and if they haven't met their burden,
20 it's your duty to dismiss it. I think that's what
21 happens in an ordinary court of law in any other
22 lawsuit. They haven't met their burden.

23 Q. I'm asking you how we'd find out what
24 those numbers were. I'm not asking for legal
25 process. I'm asking how would you find out, how

1 would the Commission find out what those numbers
2 were? Is a traffic study the only way to do that?

3 A. Well, with cell site data that's
4 captured the call when it's made where it's made.
5 Now, this is really something that hasn't happened
6 anywhere in the country because what these factors,
7 we're taking something really out of context, and I
8 think that's the genesis of your questions is how the
9 Federal Act is involved here.

10 Q. Uh-huh.

11 A. What's happening is a piece of an
12 interconnection agreement is being basically
13 negotiated through a nonunanimous stipulation, and if
14 it's only between those two parties, the standard
15 isn't that contested case standard, it's the
16 differential standard under the Act, like if setting
17 the arbitrations that we've had under the Act, we've
18 agreed with the other party on certain issues, others
19 we submit to arbitration, then we combine the whole
20 thing with your decision and our agreed upon
21 provision between interconnections is presented to
22 you and the standard there is that differential
23 standard, it's discriminatory and public interest
24 standard; and here you have, you know, that same --
25 if this was going on into an arbitration, the

1 factoring piece would already be done because it's
2 agreed to by the parties, and if it was in that
3 context, you would have what you need in order to go
4 forward to approve that agreement.

5 What complicates this is that it's
6 brought in a context of complaint case against a
7 third party. As all the witnesses have testified
8 here, those factors are negotiated between the
9 parties of interest originating, the wireless
10 carrier, and the terminating LEC, and that's all they
11 were intended to comply to, and what they're trying
12 to do here is impose secondary liability to something
13 that really doesn't happen any place else.

14 Q. Where, just if you could, where in the
15 inter -- in this agreement is Bell secondary
16 liability written?

17 A. What agreements? I'm sorry.

18 Q. In this stip, where is it that it
19 appears in this stipulation?

20 A. It's not, your Honor. It's -- they
21 just talk about the factors is my recollection.

22 Q. So where does the issue come up?

23 A. Because their claim against us, because
24 of their claim being made against us in the context
25 of this case.

1 Q. I see. But there's nothing in the stip
2 that references your liability?

3 A. I don't believe so. If they wouldn't
4 stip have indicated that it only applied to the
5 wireless carriers, we would not have objected to it.

6 Q. Bell would not be willing to
7 participate in helping to fund the traffic study?

8 A. It's not our traffic, your Honor, we
9 don't have the burden.

10 Q. The answer is no?

11 A. No, yes.

12 Q. That's fine.

13 CHAIRMAN GAW: That's all I have.
14 Thank you, Mr. Bub.

15 MR. BUB: Thank you.

16 JUDGE THOMPSON: Commissioner Murray.

17 COMMISSIONER MURRAY: I have a couple,
18 thank you.

19 QUESTIONS BY COMMISSIONER MURRAY:

20 Q. Mr. Bub, I wanted to clarify something
21 you said earlier. You talked about SBC's authority
22 to block, and I want to be sure that I understand
23 that. Is it correct that SBC cannot block traffic
24 unless they are asked to do so by the small LEC?

25 A. With regard to the traffic that

1 terminates the small ILEC, that's exactly right.

2 Q. All right. Now, I want to follow this
3 through a little bit for the reasoning here. If you
4 were held to be secondarily liable and the wireless
5 carriers did not pay and Bell paid, what would be
6 Bell's option at that point for blocking?

7 A. It wouldn't have the ability to block,
8 your Honor. Traffic now doesn't come under our
9 wireless interconnection tariff. That tariff gave us
10 the ability to block and that was a big hammer that
11 was referenced by Mr. England when we had the hearing
12 a few weeks ago, and it was that leverage that we
13 could put pressure by threatening to block
14 Voicestream and Western Wireless traffic throughout
15 the state of Missouri, but we just can't do that.
16 It's not permitted under our interconnection
17 agreements because it all flows under interconnection
18 agreements which doesn't give us the right to block,
19 only that tariff that did, and that tariff now only
20 handles less than one percent of the traffic that
21 comes from wireless carriers.

22 Q. All right. So the supposed leverage --
23 well, wait a moment. So the supposed leverage that
24 -- I just want to wait until the full bench is
25 listening. The supposed leverage that SBC has to get

1 payment, then, if they make the -- if they're forced
2 to make the payment doesn't exist?

3 A. No, it would just be another lawsuit,
4 we'd be back here before the Commission arguing the
5 same thing except it would probably just be me and
6 Mr. Johnson arguing about it, but we would be here
7 again or before a court after your ruling, and I did
8 not hear the wireless carriers here, either their
9 witness or their lawyer, say if you impose secondary
10 liability on us that they would pay. I think the
11 instructions were that they would litigate it.

12 Q. And then if the -- if the ILEC that is
13 not getting paid, rather than impose secondary
14 liability on Bell, comes to Bell and says block the
15 traffic, we're not getting paid, there is some
16 leverage there; is that correct?

17 A. Yes, yes your Honor. Leverage as in
18 the case of Goodman, Seneca, and Ozark works. It
19 brought T-Mobile to the table, they got serious, they
20 negotiated an interconnection agreement, signed it,
21 filed it, and it was approved, and Mr. England
22 indicated that they may or may not have been paid by
23 now, but they got an interconnection agreement
24 between the parties. It settled the issue.

25 Q. So if the -- if Bell were held

1 secondarily liable and the ILECs here were not paid,
2 wouldn't it be a lot easier for them just to come to
3 Bell and say we're not getting paid, you pay it?

4 A. Absolutely, your Honor, and I think
5 that's what will happen after you do a decision here.
6 If the Commission elects to impose secondary
7 liability on us, they would just send the bill to us
8 and we would be in another lawsuit. If you were to
9 impose -- if you were to say that secondary liability
10 doesn't exist, they would take your judgment, your
11 order against T-Mobile and Western Wireless down the
12 street to the county circuit court and enforce it,
13 and they'd get attorney's fees and collection costs,
14 and that was their decision up front whether they
15 wanted blocking or go the litigation route. We had
16 no say in that, and as a result, the tab got run way
17 up, and it would be extremely unfair for us now to be
18 responsible for a bad business decision gone wrong.

19 Q. And let's take this a little bit
20 further. Say you had secondary liability and
21 up-to-date, to a certain date, the ILEC said we
22 haven't been paid, Bell, pay us, so Bell pays, has no
23 leverage to block to get those payments back from the
24 wireless carriers and has no leverage to block going
25 forward, so it could keep going on and on and on,

1 could it not? They could keep coming back and saying
2 we haven't been paid for the traffic you're still
3 transiting, pay us, don't block, just pay us, and
4 that could just keep going on and on, could it not?

5 A. It could, and your Honor, this traffic,
6 when we negotiated these interconnection agreements,
7 we believe that we had a duty to carry it, and if you
8 read the Iowa decision, the Iowa Corporation
9 Commission and a Federal District Court there
10 believed that the LEC in the middle was obligated
11 under the Act to carry them.

12 When we negotiated this agreement with
13 the wireless carriers here, we believed that we were
14 required to carry it. In fact, one of the reasons we
15 believed that when we were arbitrating with AT&T, we
16 asked on this transit traffic that came, it was
17 land-lined traffic, but we asked to limit it because
18 when traffic comes through our network, it takes up
19 network capacity that we really need to serve our
20 customers. We only have limited capacity, especially
21 for tandems.

22 Each time a truck comes in, it takes up
23 termination points, and it's very expensive for us to
24 expand those, so what we did is we asked the
25 Commission to limit the amount of transit traffic

1 that a third party could send through us, and all we
2 asked was the same standard be applied that applies
3 to us when we decide whether we want to direct trunk
4 or not, and that standard is 25 voice great channels,
5 so if we have the network, I think as others have
6 explained it as a public spoke, and usually the
7 traffic goes from one end office up to the hub down
8 to another end office.

9 Well, if the traffic between two end
10 offices grows to a certain point that would justify a
11 direct connection, and it's a standard engineering
12 parameter that I think is described in Tom Hugh's
13 testimony in this case, the 25 voice great channels.
14 When it gets to that level, we put our own trunk in,
15 and that's all we ask, and we were told, no, we
16 couldn't place any limits on the amount of traffic,
17 that they had transit, so we were stuck with it, so I
18 think it's evidently unfair for us to be held liable
19 when we have no way to block it, we have no way to
20 control it, we're just told we have to carry it, and
21 the rate that we're getting is so small here. It's a
22 third of a cent, and when you look what they're
23 charging between 5 and 8, there's just no money to
24 cover it.

25 Q. And there's no choice, you don't have

1 the choice to transit this or not transit this
2 traffic?

3 A. No, if we have -- when the agreement
4 comes up for renewal, you know, we may ask for a
5 limit on the amount of traffic that we can transit,
6 and again, we would ask for that standard 25 DS1
7 level of traffic, and that would be sufficient for
8 them to justify a direct drunk, we'll probably ask
9 for that, but at this point, no, we don't, we have
10 that contract and we're obligated to follow it.

11 Q. And you have no ability to block absent
12 being asked to block by a small ILEC?

13 A. Yes, your Honor.

14 COMMISSIONER MURRAY: Thank you, that's
15 all I have.

16 JUDGE THOMPSON: Thank you,
17 Commissioner. Commissioner Forbis.

18 COMMISSIONER FORBIS: No.

19 JUDGE THOMPSON: Commissioner Clayton.

20 COMMISSIONER CLAYTON: Thank you,
21 Judge.

22 QUESTIONS BY COMMISSIONER CLAYTON:

23 Q. Mr. Bub, the interconnection agreements
24 that your client has with the wireless companies also
25 takes into consideration traffic that goes into

1 Bell's LEC area; for example, St. Louis, correct?

2 A. Yes, your Honor.

3 Q. And that's the same agreement, there's

4 not multiple agreements?

5 A. Yes.

6 Q. The traffic that terminates in Bell's

7 LEC area, I'm not sure if I'm using the right

8 terminology.

9 A. I understand.

10 Q. Bell will charge a fee back to the

11 wireless company for traffic that terminates within

12 your area, correct?

13 A. We have reciprocal compensation rates.

14 Q. Okay.

15 A. So a rate that we apply to each other,

16 depends on whose customer made the call.

17 Q. And what would happen if the wireless

18 company did not pay the amounts that they would owe

19 Bell in that circumstance?

20 A. Like I described earlier, it would

21 depend on the amount of money at issue. If it was

22 under \$25,000, then we would have that dispute

23 resolution process that I described.

24 Q. The arbitration or mediation?

25 A. Mediation and then arbitration. If it

1 was over 25, then we would probably be here or at
2 some court trying to enforce our contract.

3 Q. If it were under 25 or over 25?

4 A. Over 25. Under 25, there's no dispute
5 resolution.

6 Q. Okay. Well, that was my next question
7 is at what point would you file a complaint or have a
8 complaint before the Commission, and it's the
9 \$25,000?

10 A. Yes, under that, we're required to do
11 the mediation and American Arbitration Association.

12 Q. Does your agreement authorize the
13 payment of collection costs or attorneys fees?

14 A. I don't believe it does, your Honor.

15 Q. You don't believe it does or you're not
16 sure?

17 A. It does not.

18 Q. It does not.

19 A. We filed these in their Exhibit 8. I
20 have it in my box. I don't have it here with me.

21 Q. Do you believe that your client would
22 be eligible if we were to consider this secondary
23 reliability that the indemnification would include
24 reasonable attorneys fees and collection costs?

25 A. They're not included, your Honor.

1 Q. Do you believe this Commission has the
2 ability to order that?

3 A. I don't believe you have the authority
4 to vary an interconnection agreement that's been
5 negotiated. I don't think you can change it. You
6 can approve it, you can object, you can reject it, or
7 parts of it that are either discriminatory or against
8 the public interest, but this one's already been
9 approved, so I think we have the terms that we have.

10 Q. If, if we were to order this secondary
11 liability, would we have the ability to order --
12 order the Complainants in this case to mitigate
13 damages? Could we place a duty on them or a burden
14 on them to mitigate damages?

15 A. I believe that's what the Commission
16 did in the original order, the 97-524 Order before
17 they were entitled to secondary liability, and I'm
18 just going from memory, but there was a duty that the
19 small LECs had to make good faith collection efforts.

20 Q. Would that duty to mitigate include --
21 include having the small LECs order a block of the
22 calls in the event of having multiple months of
23 nonpayment of the bills?

24 A. You could do that, your Honor. I think
25 that would be -- you could say that that was part of

1 their duty to make good faith efforts under their
2 tariff to collect it and that's one of the remedies
3 that you gave them, and I would think that before
4 they could impose secondary liability on another
5 carrier, that they should exhaust the remedies that
6 you gave them under their tariff.

7 Q. You mentioned this in part of your
8 closing, and I apologize if I ask you to repeat
9 something, but you've covered a lot of ground --

10 A. I know I have.

11 Q. -- and despite your cold, you talk
12 awfully fast. Could you explain to me how the fees
13 for ordering blocking these telephone calls would
14 work?

15 A. Yes. And I'll do it from experience
16 with Goodman, Seneca, and Ozark. At some point, they
17 were negotiating with T-Mobile. At some point, they
18 decided that they just weren't going to get paid and
19 the negotiations weren't going anywhere, so they
20 called us, Mr. England sent a letter, and if you want
21 copies of those, we can provide them, but they asked
22 us for a quote, wanted to know how much it would
23 cost, so we went back to our network folks and what
24 we need to do is we need to figure out how many
25 places in our network the wireless carriers trunks

1 come in that serve the terminating carrier and the
2 more interconnections, the more work we have to do in
3 our central office to get that done, and in that
4 particular case, there weren't many. I don't know
5 how many there were, but our quote was about \$400,
6 and so I go back to him --

7 Q. \$400 to stop all calls coming from one
8 wireless carrier, is that what you're saying?

9 A. Yes, to three companies.

10 Q. \$400 each for three companies?

11 A. No, it was \$400 all together, so if you
12 divide it by three, 130 bucks each carrier.

13 Q. Is there also a fee to unblock, is it
14 the same thing, or can you unblock or have you ever
15 seen an unblock of calls?

16 A. We can. What we do -- what we do is if
17 you can imagine a trunk coming into our central
18 office, the trunk has a screening table that we put
19 into our switch. It's a computer table that the
20 switch knows from that table where calls from that
21 trunk can go to. Usually, that table will include
22 all the exchanges, not only of our company, but the
23 LECs behind us in the LATA, and in this case, what
24 Goodman, Seneca, and Ozark wanted us to block, what
25 we had to do was construct a new screening table that

1 would take out all of their exchanges, so if you
2 think of a siv, we just put holes so that those calls
3 couldn't go to their particular exchanges.

4 Costs more to do that blocking because
5 we have to do the computer programming to construct
6 the table. To take it off would be quicker. So I
7 don't know -- we haven't actually implemented a block
8 with Goodman, Seneca, and Ozark, and we had a
9 blocking day that we notified the carrier that we
10 were going to block, and as reflected in Mr.
11 Schoonmaker's testimony, it literally that day, it
12 was like a Friday, they were, you know, we had the
13 programming in to block as of midnight, and then all
14 of T-Mobile's calls to those company's exchanges
15 would cease, and they said that, you know, they're
16 negotiating, we got their attention, they're
17 negotiating, Bell, please don't block, so we undid
18 the programming.

19 Q. Those were three different cases or
20 were they one?

21 A. One.

22 Q. Have you had any other situation where
23 blocking has arisen?

24 A. Yes, we had another one where actually,
25 it was a -- another carrier, Mark Twain, asked us to

1 block one other wireless carrier, we researched that
2 one, we gave another quote, it was again \$400, so we
3 sent that off in a letter, and in that particular
4 case before the blocking was ever needed, the
5 wireless carrier paid, but in the Goodman, Seneca,
6 and Ozark case, they signed the letter, we did the
7 work, so we had that screening table and we still
8 have that screening table, so if for some reason
9 they're not paid, we've already done the work and it
10 can be applied like that. I would expect to take off
11 the blocking, it would be nominal if no charges. The
12 work is up front creating the table and then applying
13 it.

14 Q. Going back to the collection activity
15 where the agreement requires alternative dispute
16 resolution whether it be through mediation or
17 arbitration, are those frequent?

18 A. No.

19 Q. Are those disputes frequent?

20 A. No.

21 Q. How often have they occurred in the
22 past?

23 A. None with wireless carriers. We had
24 some going with the Commission and with Delta Phone.

25 Q. That's an example of a case that where

1 there was nonpayment and --

2 A. And we asked -- the way -- there was

3 nonpayment --

4 Q. And I think that case is dismissed.

5 A. It has been dismissed.

6 Q. Okay.

7 A. And in that particular case, I think

8 this would show the frustration we have and what we

9 would have with secondary liability. In that

10 particular case, they were directly connected with us

11 and we weren't being paid, and one of the things that

12 we had in that CLEC interconnection agreement was the

13 ability to cease working new orders, and we told

14 them, it's all spelled out in the agreement, we told

15 them that since they haven't paid, not amount of

16 dispute, undisputed amounts, that we would cease, and

17 what happened in that case, they way it was brought

18 to you was as a complaint case against us because we

19 were going to cease working their orders, and you

20 know the history in that case, it just went on for a

21 long time. The whole time we weren't being paid

22 anything. Finally, they dismissed the complaint,

23 like it's been dismissed in several of our other

24 states.

25 COMMISSIONER CLAYTON: I don't have any

1 other questions. Thank you.

2 THE WITNESS: Thank you, your Honor. I
3 appreciate it.

4 JUDGE THOMPSON: Okay. I have one
5 question for you, Mr. Bub.

6 With respect to traffic blocking, is
7 that tariffed as a service?

8 MR. BUB: No, it is not. With the
9 authority we have for doing that is your Order
10 approving the small ILEC wireless termination
11 tariffs.

12 JUDGE THOMPSON: Okay. Further
13 questions from the bench? I hear none. You may step
14 down, Mr. Bub.

15 MR. BUB: Thank you, your Honor.

16 JUDGE THOMPSON: We'll go ahead and
17 take the lunch recess at this time and return at
18 1:30. Thank you.

19 (A LUNCH BREAK WAS HAD.)

20 JUDGE THOMPSON: Okay. We'll go back
21 on the record, and Mr. Bates, I believe we're ready
22 for you.

23 MR. BATES: Thank you, your Honor and
24 Commissioners.

25 Good afternoon. You've already heard

1 several very well delivered and well reasoned
2 arguments, so I will try not to take too much of your
3 time this afternoon, but on behalf of the Staff, I'd
4 like to state that we believe that the thrust of this
5 complaint case involves three issues.

6 First, are the Complainants entitled to
7 compensation for terminating wireless originated
8 traffic by Voicestream and Western. Second, should
9 Southwestern Bell be secondarily liable should
10 Voicestream and Western not pay, and third, should
11 the Commission adopt the interMTA factors negotiated
12 between Voicestream and the Complainants and between
13 Western and the Complainants.

14 And just to remind the Commission,
15 wireless originated traffic originates and terminates
16 either within the same major trading area, which is
17 called intraMTA traffic, or between various MTAs,
18 which is called interMTA traffic.

19 Wireless originated interMTA calls are
20 subject to access charges, just like long distance
21 calls, while wireless originated intraMTA calls are
22 considered local calls and are subject to the
23 respective Complainants' termination tariff rate
24 absent an interconnection agreement between the
25 wireless provider and Complainant.

1 As to the first question, are the
2 Complainants entitled to compensation for terminating
3 wireless originated traffic by Voicestream and
4 Western. It is Staff's position that the
5 Complainants are entitled to compensation for
6 terminating wireless originated calls. The
7 Complainants who build, operate, and maintain the
8 local network have invested capital in creating the
9 local network and incur costs in its operation and
10 its maintenance.

11 The Complainants have produced evidence
12 in which the Complainants are invoicing Voicestream
13 and Western based on monthly cellular transiting
14 usage summary reports supplied by SWBT that
15 identifies Voicestream and Western as originating
16 wireless traffic which transits over SWBT's
17 facilities for termination to the Complainants'
18 exchanges.

19 The evidence in this can be found in
20 the direct testimony filed by the Complainants.
21 Specifically, the Schedule 1's of witnesses Winberry,
22 Mattsdorf, Cornelius, Wilbert, Buyer, Rieter, Cotton,
23 Copsy, Faircloth, Boyd, and Brody. The Complainants
24 each have respective wireless termination tariff on
25 file and approved by this Commission that applies in

1 the absence of an agreement negotiated or arbitrated
2 pursuant to the Telecommunications Act of 1996.

3 The wireless termination tariffs apply
4 to intraMTA traffic. This evidence is contained in
5 Staff witness Scheperle's rebuttal testimony at Page
6 3, Lines 21, through Page 4, line 3, and also in
7 Schedule 1 to Mr. Scheperle's rebuttal testimony.

8 Also, each Complainant has a switched
9 access tariff that applies to interMTA traffic.
10 Therefore, each Complainant has Commissioned-approved
11 tariff wireless termination tariff for interMTA
12 traffic and a switched access tariff for intraMTA
13 traffic that apply to the wireless originated
14 traffic.

15 It is Staff's believe that all parties
16 agree that each Complainant has applicable tariffs
17 for wireless originated traffic; therefore, in
18 Staff's opinion, there is no reason that Voicestream
19 and Western should not pay the Complainants for
20 terminating the wireless originated traffic.

21 As to the second question, should
22 Southwestern Bell be secondarily liable should
23 Voicestream and Western Wireless not pay. Staff
24 believes that question should be answered in the
25 negative. Southwestern Bell should not be held

1 liable for any unpaid amounts by Voicestream and/or
2 Western. Voicestream and Western are responsible for
3 the traffic in dispute, whether interMTA traffic or
4 intraMTA traffic.

5 In a previous decision by this
6 Commission referenced earlier by other counsel, Case
7 No. TT-97-524, the Commission stated that quote if
8 SWBT knows it will be secondarily liable to the third
9 party LECs, it will have an incentive to enforce the
10 provisions of its tariff in its interconnection
11 agreements which require wireless carriers to enter
12 into agreements with third party LECs unquote.

13 The Report and Order in that case
14 issued on December 23rd, 1997 states this. This
15 Commission's statement suggests that SWBT will be
16 liable if a wireless provider fails to adequately
17 compensate a third party LEC for terminating wireless
18 originated traffic that's pointed out by Staff
19 witness Scheperle in his rebuttal testimony found in
20 Pages 5 and 6.

21 However, more recent Commission Orders
22 suggest the originator of the traffic, in this case
23 wireless originated traffic, is responsible for the
24 payment and blocking the traffic might be -- traffic
25 and might be the more appropriate method of handling

1 delinquent carrier traffic should a wireless carrier
2 not pay.

3 To understand this principle, an
4 understanding of wording in the interconnection
5 agreement between Voicestream and Southwestern Bell
6 and wording in the interconnection agreement between
7 Western and Southwestern Bell is helpful.
8 The wording is found in Section 3.1.3 and is the same
9 for both interconnections agreements, so contained in
10 the original Complaint in this case on Page 10.

11 Specifically, Section 3.1.3 entitled
12 traffic to third party providers provides that
13 carrier and SWBT shall compensate each other for
14 traffic that transits their respective systems to any
15 third party provider as specified in appendix
16 pricing. The parties agree to enter into their own
17 agreements with third party providers.

18 In the event that carriers sends
19 traffic through SWBT's network to a third party
20 provider with whom carrier does not have a
21 interchange agreement, then carrier agrees to
22 indemnify SWBT for any termination charges rendered
23 by a third party provider for such traffic.

24 Now, the Staff believes that the second
25 sentence is critical here and we bring your attention

1 to it. Quote the parties agree to enter into their
2 own agreements with third party providers unquote.
3 Here, a compensation mechanism has not occurred.
4 Voicestream and Western have not entered into a
5 compensation agreement with the Complainants.
6 Basically, wireless originated traffic was not being
7 paid to any LEC because agreements did not exist with
8 a few exceptions.

9 Therefore, the small LECs filed
10 wireless termination tariffs for compensation
11 arrangement absent an agreement between the wireless
12 carrier and the small LEC. The wireless termination
13 tariffs are Commission approved and have the same
14 exact wording in almost all these cases.

15 In Commission Case No. TT-2001-139,
16 this Commission approved 29 wireless termination
17 tariffs. In this case, 12 out of the 14 Complainant
18 wireless termination tariffs were related to Case No.
19 TT-2001-139. It is the Commission's Report and Order
20 in that case where it repeatedly states that the
21 wireless carrier is responsible for payment and
22 nowhere does it mention that SWBT is liable for any
23 traffic originated by a wireless carrier. The record
24 in this case states this concept repeatedly.

25 Staff witness, Mike Scheperle, in his

1 rebuttal testimony points out three quotes from the
2 wireless termination tariffs detailing this concept.
3 If I may, I'd like to go over them briefly.
4 Specifically, Section E.5 of each Complainants'
5 wireless tariffs states quote the CMRS providers
6 shall pay the telephone company for all charges in
7 accordance with the rates set forth in this tariff.
8 The CMRS provider shall pay a late charge on any
9 undisputed charge. This can also be found in Mr.
10 Scheperle's rebuttal testimony, Page 4, Line 7
11 through 13.

12 In addition, Section G.1 provides that
13 if the CMRS provider fails to comply with any of the
14 terms and conditions of this tariff, including any
15 payments to be made by it, found Scheperle rebuttal,
16 Page 5, Lines 1 through 4, and thirdly, Section G.3,
17 if the telephone company is unable to effectuate the
18 discontinuance of service at its own office and
19 requests the assistance of other ILECs with whom the
20 telephone company's network is connected, found
21 Scheperle rebuttal, Page 5, Lines 13 through 16.

22 Also, Mr. Hughes, representing SWBT, in
23 his rebuttal testimony pointed out other references
24 in the wireless termination tariffs that CMSR
25 providers are responsible for payment. Specifically

1 on Page 7 of his rebuttal, Lines 3 through 4,
2 referring to the tariffs of Section E, Subsection 1,
3 he states the telephone company shall issue a bill to
4 the CMRS provider. Also, on surrebuttal, Page 7,
5 Lines 10 through 11, referring to Subsection 5 of the
6 records and billing section of the tariff, which
7 states that the CMRS provider shall pay the telephone
8 company for all charges.

9 The Complainants in this case, the wire
10 -- their wireless termination tariffs state that the
11 tariff applies to interMTA traffic originated by CMRS
12 provider who is responsible for payment of the
13 traffic. There is nothing in the Complainants'
14 wireless termination tariffs or in the Report and
15 Order in this Commission's case TT-2001-139 that
16 suggests Southwestern Bell should be liable for this
17 traffic.

18 In fact, the wireless termination
19 tariffs make clear that if the wireless carrier does
20 not pay, then the wireless carrier's traffic may be
21 blocked. Therefore, again, Staff believes that
22 Southwestern Bell should not be secondarily liable
23 for unpaid amounts by Voicestream or Western
24 Wireless.

25 The third question before this

1 Commission is should the Commission adopt the
2 interMTA factors negotiated between Voicestream and
3 the Complainants and between Western and the
4 Complainants. Staff supports the interMTA factors
5 negotiated and agreed to by Voicestream and Western
6 and the Complainants.

7 The Voicestream and Southwestern Bell
8 interconnection agreements and the Western Wireless
9 and Southwestern Bell interconnection agreements
10 state in Section 3.1.3 that the party's agree to
11 enter into their own agreements with third party
12 providers. In this case, the Complainants.

13 From Staff's perspective, the wording
14 agree to enter into their own agreements means an
15 agreement between the wireless carrier and the
16 Complainants is contemplated. Southwestern Bell does
17 not need to be a party to interMTA factors negotiated
18 and agreed to by the wireless carriers and the
19 Complainants.

20 In conclusion, the negotiated and
21 agreed to interMTA factors between Voicestream and
22 Western on the one hand and Complainants on the other
23 are, in Staff's opinion, not discriminatory to any
24 party and Staff recommends their approval by this
25 Commission.

1 Thank you.

2 JUDGE THOMPSON: Thank you, Mr. Bates.

3 Commissioner Murray.

4 COMMISSIONER MURRAY: I don't believe

5 so, thank you.

6 JUDGE THOMPSON: Commissioner Forbis.

7 COMMISSIONER FORBIS: No, I don't think

8 so.

9 JUDGE THOMPSON: Commissioner Clayton.

10 COMMISSIONER CLAYTON: Thank you,

11 Judge.

12 QUESTIONS BY COMMISSIONER CLAYTON:

13 Q. The Staff's position is that, on the

14 second issue, that SBC should not be held secondarily

15 liable for -- for the debt of the other Respondents,

16 the wireless carriers; is that correct?

17 A. Yes, sir.

18 Q. Okay. In light of all the

19 interconnection agreements and the wireless tariffs

20 and prior Commission Orders, do you believe that the

21 Commission has the ability, the authority, the legal

22 ability, to order SBC to be secondarily liable?

23 A. You may also be referencing

24 Commissioner Gaw's question at the end of the

25 evidentiary hearing about what affect the

1 Telecommunications Act of 1996 might have on this
2 question, and I would agree with Mr. England's
3 earlier statement.

4 I don't think that that's dispositive
5 here, even very clear. There is the one case that
6 Mr. England earlier cited and which I mentioned
7 TT-97-524, which stated that if Southwestern Bell's
8 knows it will be secondarily liable to third party
9 LECs, it will have an incentive to enforce the
10 provisions of its tariff, et cetera, thereby implying
11 that it might be held liable here; however, while I
12 think it is arguable that the Commission might have
13 the legal authority to make such an Order, it appears
14 to Staff that in the light of the Commission's later
15 decisions and also in the wording of these tariffs,
16 that in this case it would not be appropriate.

17 Q. Is that a yes or a no?

18 A. It's -- if you were asking me to say
19 either yes or no --

20 Q. Do we have the legal ability in our
21 Order to order SBC to be secondarily liable? In
22 staff's position, do we have the ability to even do
23 that here? I understand you don't think we should,
24 but do we have the ability to do that?

25 A. We would argue no.

1 Q. That we do not have the legal authority
2 to do that?

3 A. Yes.

4 Q. Okay. All right.

5 A. With all due respect of the Commission
6 and its authority.

7 Q. I understand. My ego can handle it.
8 Is it a fair statement that Staff believes that the
9 best remedy for the Complainants is to exercise the
10 ability to block the calls coming in? Is that a fair
11 assessment of Staff's position?

12 A. I don't think Staff has specifically
13 taken a position on that question, but it's certainly
14 within their power to do.

15 COMMISSIONER CLAYTON: I don't think I
16 have any further questions, Judge. Thank you.

17 JUDGE THOMPSON: Thank you,
18 Commissioner. Any other questions from the bench?
19 Hearing none, Mr. Bates, you may sit down.

20 MR. BATES: Thank you.

21 JUDGE THOMPSON: That concludes our
22 closing arguments today unless anyone else has
23 anything else they would like to bring to the
24 attention of the Commission at this time.

25 COMMISSIONER CLAYTON: Can I ask -- I

1 don't know if this is appropriate, can I ask the
2 Complainant's attorney?

3 JUDGE THOMPSON: Absolutely, Mr.

4 England, come up to the podium, sir.

5 QUESTIONS BY COMMISSIONER CLAYTON:

6 Q. I don't know if this is appropriate. I
7 want to make sure that I'm clear on a couple of
8 things and you started off the discussions earlier
9 today, but in light of the conversation we've later
10 had, your clients' position is that we not only do we
11 have the authority to order SBC to be secondarily
12 liable, but that we should order them to be
13 secondarily liable, correct?

14 A. Yes.

15 Q. There was discussion between Mr. Bub
16 and me during his presentation, during his closing,
17 that the cost of blocking telephone calls was
18 relatively small. You were in the room when we had
19 that conversation. Do you have any reason to
20 disagree with the relatively low cost and ease with
21 which telephone calls like this can be blocked?

22 A. I have no disagreement with the figures
23 that Mr. Bub quoted. My understanding is it also
24 depends on the number of Southwestern Bell switches
25 that this traffic goes through to get to our

1 exchanges, if you will.

2 In the Seneca, Goodman, Ozark example,
3 I think there was just the one tandem in the
4 Springfield LATA, the Springfield tandem; however, if
5 you're in the St. Louis LATA, there may be
6 interconnections in St. Louis, but it may go from
7 there to another tandem, say, in Cape Girardeau or in
8 the southeast part of the state, so it may require
9 more programming work than Mr. Bub described to you,
10 so the costs do vary.

11 Early on, we asked some quotes for
12 Citizens, or I can't remember, Fidelity maybe, and
13 some of the quotes were in the low thousands, one or
14 two thousand dollars, I think. The last couple have
15 been in the low hundreds, the four or five hundred
16 dollar range as I recall.

17 Q. And can you repeat for me how much the
18 amount of money that is currently outstanding between
19 the Respondents, just a ballpark figure?

20 A. I can. For purposes of the Complaint
21 itself, which was filed in May of '02, I believe, it
22 was roughly 160,000 for Voicestream and maybe 39 or
23 40,000 for Western. Since then, what we've found and
24 clarified through the testimony of Mr. Williams here
25 earlier this month, a lot of that 30, 40 thousand

1 dollars of wireless -- Western Wireless traffic is
2 actually T-Mobile's, and so there would be more on
3 T-Mobile, less on Western Wireless.

4 As of May of this year, we were just
5 looking at T-Mobile. The amounts are over \$500,000
6 just based on wireless tariff rates alone.

7 Q. Okay. Has -- and your client has --
8 your clients have never sought to block the calls
9 coming through?

10 A. I don't believe in this particular
11 proceeding. And again, let me get back to my
12 original opening, you have to understand the time
13 frame in which we filed this. We filed this in May
14 of '02, and we didn't have a final decision on the
15 lawfulness of our wireless tariffs until
16 approximately a year later in April. I can tell you
17 right now in hindsight, I would have opted for the
18 blocking option.

19 Q. Well \$500 versus 500,000.

20 A. And I agree, it just -- it is an
21 effective way in which to pursue these arrangements.
22 At the time, we were a little bit worried, quite
23 honestly, whether our tariff was going to withstand
24 judicial review, and we thought the appropriate thing
25 to do was to bring a Complaint.

1 I'm a little upset with Mr. Bub's
2 characterization that we're running up the tab. The
3 fact that we're having this proceeding and had the
4 one in November was because Southwestern Bell had
5 their foot on the accelerator, not us.

6 If you recall, they initially objected
7 to all 14 interMTA factors, many of which were 0, so
8 it had no affect on them, refused to allow those to
9 proceed to a decision, and only until a week or so
10 before the hearing when we had the issue's list and
11 filed rebuttal testimony that they acknowledged maybe
12 we don't have an argument with at least 11 of the 14
13 Complainants.

14 I think getting back to the secondarily
15 liability issue, I felt that that was something we
16 got in return for Southwestern Bell being allowed to
17 get out from under any obligation to pay us for
18 traffic primarily in their wireless tariff case. I
19 thought it meant something at the time and I still
20 think it means something. As I indicated earlier,
21 I'll leave that to you all.

22 It was a Commission decision, but I
23 think it was intended to have some affect and I would
24 like to think that it still does today. I understand
25 Mr. Bub's and Staff's argument that subsequent cases,

1 you know, may have altered the arrangement and may
2 have indirectly undone what the Commission intended
3 to do back in '97 or '98. I found no specific
4 reference to that, but you may tell me otherwise.

5 It just seems to me that Southwestern
6 Bell is not the innocent bystander in this. They
7 have some obligation, as the Commission recognized in
8 '97, to make sure that their interconnection
9 agreements are being adhered to, and in May of '02
10 when we filed this Complaint, they certainly were put
11 on notice if not shortly before then, that these
12 particular wireless carriers were not living up to
13 their obligations, so I think there is some
14 obligation, some opportunity on their part to stop
15 the bleeding.

16 You've inquired of Mr. Bub what would
17 happen if its \$25,000 or more in dispute, which we
18 obviously have here, they can terminate their
19 contract under the terms of their interconnection
20 agreement. They simply have to give 30 days notice,
21 and they can terminate the agreement. This traffic
22 would then be subject to their wireless tariff and
23 they're back in business with a blocking remedy that
24 they have in their own tariff. I'm sorry, I got a
25 little far afield.

1 Q. No, that's fine. I asked this question
2 of several of the parties. Your reading of the
3 agreements, do you believe that the Commission, if we
4 -- if we were to Order a secondary liability
5 situation where Southwestern Bell would be able to
6 recoup attorney's fees and costs in going to collect
7 those monies from the other Respondents, do you
8 believe we have that ability or you may not have a
9 position?

10 A. I think when you indicate that
11 attorneys fees and late payment fees are permissible
12 pursuant to our tariff, and if Southwestern Bell is
13 then secondarily liable, I think under the
14 indemnification provisions of their interconnection
15 agreement, they can turn around and bill the wireless
16 carrier for all of them.

17 Q. And those are included in your client's
18 tariff?

19 A. Correct, uh-huh, yes.

20 Q. Okay. Thank you.

21 COMMISSIONER CLAYTON: Thank you,
22 Judge.

23 JUDGE THOMPSON: Commissioner Murray.

24 COMMISSIONER MURRAY: Since Mr. England
25 is up here, I have a few questions for you also.

1 MR. ENGLAND: Sure.

2 QUESTIONS BY COMMISSIONER MURRAY:

3 Q. I was trying to recreate in my mind

4 this long, long scenario of small ILEC's fight with

5 trying to get compensation for wireless termination

6 traffic terminated, and in the beginning, the ILECs

7 were supposed to enter into interconnection

8 agreements; is that correct? Do they have an

9 obligation to negotiate in good faith for

10 interconnection agreements?

11 A. Yes, under the Telecommunications Act

12 of '96, that's correct, and that's the beginning

13 we're starting with? '96?

14 Q. Yes, uh-huh.

15 A. Okay.

16 Q. And some of the -- many of the wireless

17 carriers, in fact, if I recall, most of them claim

18 that the small ILECs who complained about not being

19 paid had not negotiated in good faith and not

20 negotiated interconnection agreements. Is that

21 accurate?

22 A. I recall those claims and we vehemently

23 dispute that. We entered into negotiations or agreed

24 to negotiate with each and every one that came to us

25 and asked to negotiate.

1 Q. And asked specifically that they
2 interconnect directly with you; is that correct?

3 A. No, not at all. We acknowledged that
4 they could connect indirectly and were willing to do
5 that, so that was not an impediment with our group.
6 Now, I can tell you there were three very real
7 impediments that caused all those negotiations to
8 come to no -- come to no negotiated result, but it
9 wasn't because we demanded direct interconnection, we
10 did not, and I think there seems to be some
11 misunderstanding, but we have always been willing to
12 interconnect, if you will, indirectly.

13 Q. Around those three impediments were?

14 A. The rate, the rate to be charged.

15 Q. The rate charged by -- to be charged by
16 your clients?

17 A. Well, it would be reciprocal. The --
18 and we're acknowledging reciprocal obligation where
19 we carried that traffic and that was the second
20 issue. What traffic are we responsible for, because
21 a large part of the traffic leaving our exchanges
22 destined for wireless customers is long distance
23 traffic. They're NPA/NXX's, for example, St. Louis
24 or Kansas City, so when you call that wireless
25 carrier, it's a long distance call.

1 That call is carried by the
2 subscriber's interexchange carrier, and we've
3 maintained that this is the interexchange carrier's
4 responsibility for compensating the wireless company
5 for terminating the call.

6 The third issue was what I call the
7 pre-tariff traffic. When you talk history, as you
8 recall, Southwestern Bell changed their tariff in
9 '98, roughly, I think February of '98, and from '98
10 until roughly February of 2001, we, the small
11 companies, did not have a tariff, wireless tariff.

12 You had told us in a case involving
13 Alma and some other companies in the Missouri
14 Independent Company Group that access wouldn't apply,
15 so we had a period of approximately three years where
16 the wireless carriers wouldn't pay us, and as part of
17 our negotiations, we demanded that we negotiate
18 compensation for that three-year period of time.

19 So you had the rate per minute that was
20 in dispute. You had the extent of our reciprocal
21 compensation obligation that was in dispute, and you
22 had what I called the pre-tariff or pre-agreement
23 traffic that was in dispute, and we were perfectly
24 willing to arbitrate those.

25 In fact, we tried to bring that

1 arbitration to you in negotiations with ALLtel
2 Wireless but were dismissed on procedural grounds.

3 Q. And then you began, at some point, your
4 clients began filing wireless termination tariffs?

5 A. Correct.

6 Q. And within those tariffs, you were
7 granted the remedy of blocking by asking the
8 transiting carrier to block if you were not paid?

9 A. That's in our wireless tariff, correct.

10 Q. And you earlier, in the response to
11 Commissioner Clayton, said something about that if
12 SWBT were secondarily liable, they could terminate
13 their interconnection agreement. I'm assuming you're
14 talking about their interconnection agreement with
15 the wireless carrier.

16 A. Correct.

17 Q. And I assume that they interconnect to
18 many places, interconnect that wireless carrier to
19 many other exchanges other than your clients. Would
20 you assume that would be correct?

21 A. I'm not sure how many places they
22 interconnect, but they deliver traffic to other
23 destinations besides my clients.

24 Q. Okay. And that's what I meant. And
25 then you said they could apply their wireless

1 termination tariff, but they're not actually
2 terminating the calls, are they, they're only
3 transiting?

4 A. That tariff applies to both transiting
5 traffic to us and to traffic that they terminate to
6 their own exchanges.

7 Q. Right, to their own exchanges.

8 A. But I mean, it deals with both
9 situations. It deals with traffic that terminates to
10 their exchanges and traffic that terminates to our
11 exchanges. In many respects, it's very similar to
12 the wireless termination tariff that we filed.

13 Q. And is it your position that
14 Southwestern Bell could terminate an interconnection
15 agreement with another carrier under the
16 Telecommunications Act and refuse to carry transiting
17 traffic of that carrier?

18 A. Those are two questions. I think for
19 cause they can terminate an interconnection
20 agreement, depending on what the terms of the
21 interconnection agreement are. This one says they
22 can if T-Mobile's in material breach in their
23 obligations under the agreement, so yes, if the
24 wireless carrier's in material breach, Southwestern
25 Bell can terminate the agreement. If you like, I can

1 give you the section on that.

2 Your next question, I'm sorry, I lost

3 --

4 JUDGE THOMPSON: Can they refuse to

5 carry the traffic.

6 MR. ENGLAND: Oh, can they refuse to

7 carry the traffic. That is something that Bell has

8 changed positions on. We've always argued they

9 didn't have an obligation to transit the traffic.

10 Initially, they argued that. As a matter of fact,

11 that was one of the basis for getting the change to

12 their wireless tariff that they had no choice in the

13 matter. Now they recognize and have expressed so in

14 this proceeding and in briefs in other cases that

15 they don't have an obligation to transit traffic

16 under the Telecommunications Act.

17 Q. (By Commissioner Murray) I don't

18 believe I heard them say that in this proceeding.

19 A. Well, excuse me a second.

20 JUDGE THOMPSON: Mr. Bub.

21 MR. BUB: Your Honor, if I may short

22 circuit it, Tom Hughes had that in his testimony.

23 There was an opinion that the FCC, I want to say in

24 Virginia, where the FCC Common Carrier Bureau was

25 acting as an Arbitrator because the Commission in

1 Virginia didn't want to hear the arbitrations of the
2 common carrier, and in that case, there was a claim
3 by MCI that Verizon had to transit traffic and it was
4 also responsible for paying terminating charges.

5 And I think it's explained in Tom
6 Hughes, I want to say maybe his rebuttal testimony,
7 that our position as a result of that decision did
8 change. We questioned whether we had an absolute
9 right, because I think what the Common Carrier Bureau
10 may have said was that they never required it, and I
11 think they went on to say that even if it was, there
12 was no requirement to do it at tell rates, and that
13 was the second issue.

14 But they also affirmed that there was
15 no obligation for Verizon to serve as the
16 Clearinghouse and be responsible and pay the
17 terminating carriers, which is what MCI wanted, so
18 Mr. England is correct that that decision did change
19 some of our thinking, whether we're right or not,
20 that's a mixed bag. Some places -- that's the only
21 one I know of where there's found to be no
22 obligation. Like I say --

23 COMMISSIONER MURRAY: And that
24 obligation you're talking about is obligation to
25 transit as well as obligation to pay?

1 MR. BUB: Yes, I think they had both in
2 it. If you give me a moment, I can maybe point to
3 you Tom's testimony.

4 COMMISSIONER MURRAY: Thank you.

5 MR. ENGLAND: First of all, let me
6 agree with what Mr. Bub has represented to you, and
7 then Mr. McCartney points out that I think the case
8 Mr. Bub is referencing is cited in his initial brief
9 filed last year on Page 12. I think there's a quote
10 on the bottom of the page and there's a cite and
11 footnote at the bottom of that page.

12 COMMISSIONER MURRAY: I'll have to look
13 those up. Thank you. Okay. I think that's all I
14 have. Thank you.

15 JUDGE THOMPSON: Commissioner Clayton.

16 QUESTIONS BY COMMISSIONER CLAYTON:

17 Q. I'm sorry, while I have you up here,
18 procedurally in this case, this was a complaint case,
19 correct?

20 A. Correct.

21 Q. And depending on how the Commission
22 rules, obviously that will play a part in where you
23 go from here, but does -- do your clients have a
24 mechanism outside the Commission to enforce payment?
25 And I'll give you a -- for example, we cannot Order,

1 I don't think, a monetary judgment --

2 A. That's correct.

3 Q. -- correct? So in this case where

4 there is still a significant amount of money

5 outstanding, there is an agreement. For example, if

6 the Respondents three months down the road after the

7 conclusion of this case refuse to pay, what is the

8 next step procedurally for your clients? What would

9 they do? Do they take this Commission's Order and go

10 to Circuit Court or how would that work?

11 A. Generally speaking, yes, and I've been

12 kind of interested following the Commission agenda

13 discussion regarding how you all are going to go

14 about companies to pay assessments who haven't paid,

15 but I believe it is, particularly in the case where

16 the issue is what rate applies and how much does the

17 customer owe, I think you all have primary

18 jurisdiction.

19 I have to come to you to get a

20 determination that my wireless tariff applies to

21 intraMTA traffic, and then to the extent we have any

22 interMTA, that my access tariff applies, and once I

23 get that decision, then I can go to Circuit Court and

24 eventually sue on that. I'm still going to have to

25 probably prove up amounts, certainly amounts for

1 attorney's fees and what have you, but I am going to
2 have to pursue my claim, then, in Circuit Court
3 again.

4 Now, I say again, there are some issues
5 I think that will be resolved by this Commission, for
6 example, what rate to apply, the amount of traffic,
7 that's why I want you all to indicate that that
8 traffic is as shown in the CTUSR reports. The
9 validity of the tariff, I think that's their
10 collateral estoppel from raising that, but I think
11 you all need to reaffirm it anyway in this case since
12 that issue has been raised, but those hopefully I
13 wouldn't have to relitigate again in Circuit Court,
14 but I would have to prove up the amount of money
15 based on the rate you tell me is appropriate, the
16 minutes that we're going to use, as I said attorney's
17 fees, late payment charges will be a mathematical
18 calculation.

19 Q. Well, in light of the agreement that
20 you have with the wireless carriers or the wireless
21 companies, can you give me an answer as to why some
22 payment hasn't been made in the course of this case?
23 Are we simply waiting for an outcome?

24 A. I don't know. I could give lots of
25 opinions and it probably wouldn't be fair. It would

1 be jaded by my own personal -- I better be careful
2 what I say. I don't think it would be fair for me to
3 comment on what I think they're going to do or not
4 do. My only hope is if you issue a Decision that
5 they will abide by it. I expect one of my remedies
6 is -- is to pursue blocking when I get a final Order
7 from you all, if I can't get this resolved, so I can
8 at least, as Mr. Bub stated, stop the damage on a
9 going forward basis.

10 Q. I'm going to get into that in my next
11 set of questions, but one of the things that Mr. Bub
12 brought up was this case has been going on for some
13 time, payment has not been forthcoming despite a
14 Stipulation and Agreement, that if we were to order
15 some sort of secondary liability that the day after
16 the Order, that you would send a demand letter, and
17 after 10 days, if there's no payment, that you're
18 immediately going to take the Order and go to the
19 other Respondent, to Southwestern Bell, to enforce
20 that liability, and it is a question to me why, with
21 all this time and with agreements between you, why
22 there hasn't been some payment forthcoming.

23 A. I don't know, and I probably, as I
24 said, I'm not the person to ask that, because I
25 prejudice the whole thing by what I --

1 Q. I understand. Let me close -- let me,
2 I guess, with my final thought, if you even want to
3 call it a thought, is as this case has matured, and
4 it was filed some time ago with the conclusion of
5 other cases out there, with the maturing the
6 agreements, with Orders that are now in place, and
7 with this discussion about blocking of these phone
8 calls in the event of nonpayment of the fees that
9 would be owed your clients, is there a need to make a
10 decision on this secondary liability as we look
11 forward on this secondary liability?

12 A. When you say on going forward, do you
13 mean the liability for traffic to be delivered in the
14 future?

15 Q. Yes.

16 A. I -- boy, that's a darn good question.
17 I think my opportunity for secondary liability is
18 specifically identified in that Order that we -- that
19 '97 Order. I agree with Mr. Bates, Mr. Bub, that in
20 other forms before you all, where we have attempted
21 to hold Southwestern Bell responsible for traffic
22 they've delivered to us but they don't originate,
23 they transit, we have been unsuccessful to this point
24 getting -- convincing the Commission that
25 Southwestern Bell should bear some financial

1 responsibility for that traffic, so to date, I'm just
2 looking for something what I consider to be a narrow
3 fact situation where I thought you told me back in
4 '97 that I'd have } secondary liability relief, if
5 you will, with Southwestern Bell, and I'm not trying
6 to relitigate or retry or prejudice other cases
7 before you that may be the circumstances were a
8 little different, not that I wouldn't have the same
9 opinion, but I don't have a '97 Order that I think
10 clearly gives me that right in this case.

11 COMMISSIONER CLAYTON: Thank you.

12 JUDGE THOMPSON: Commissioner Murray.

13 QUESTIONS BY COMMISSIONER MURRAY:

14 Q. Like the Judge said earlier, if SWBT
15 were held secondarily liable, how long would your
16 clients have to wait before they went to SWBT after
17 submitting bills to the wireless carriers to say,
18 SWBT, we haven't been paid, pay us now?

19 A. I think we'd probably explore that
20 possibility right after the Order became effective.

21 Q. And then in the future, if the wireless
22 carriers did not pay, how long would you be able to
23 not block -- not ask for blocking and go back to Bell
24 and say we're still not getting paid, you have to pay
25 us?

1 A. It's not our intent to keep the tap
2 running and look to Southwestern Bell for recovery.
3 As I think I indicated before, in the future, we're
4 going to pursue the blocking option where we don't
5 get paid, so if Bell is going to be secondarily
6 liable, it's going to be for a short period of time
7 until we can implement that block. We're not going
8 to leave the spicket on and not help them put a stop
9 to it.

10 As I said before, they're secondarily
11 liable, we recognize, based on your prior Orders,
12 that the wireless companies are supposed to be the
13 ones paying us this stuff, and most of them are,
14 except for T-Mobile.

15 Q. So under that situation, you're saying
16 that -- say you rendered a bill and within 30 days
17 that bill hadn't been paid, then would you seek
18 blocking?

19 A. Depends on the size of the bill. I
20 mean, we have some folks with traffic 15, 25 dollars,
21 and we might wait several months because maybe the
22 carrier wants to accumulate bills to pay us, so it
23 really is, I guess, it's a matter of magnitude or
24 materiality.

25 Q. But that would be your client's total

1 discretion as to how long to wait, how large to let
2 the bill get before you went to Bell and said pay us?

3 A. You're absolutely right. I guess if
4 you think that we're out here to hit a big payday
5 with Southwestern Bell Telephone Company, nothing I
6 can say or promise you is going to change that, but
7 that's not the way we operate. We, as I said, we
8 looked at the wireless carriers for primary
9 liability, and with exception of T-Mobile, they have
10 been, and it's worked well.

11 If we have a wireless, such as T-Mobile
12 or someone else in the future that's not paying us,
13 we will pursue blocking. That example that Mr. Bub
14 gave you of Mark Twain, a carrier -- the wireless
15 carrier that wasn't paying the bill, it was only, I
16 think, \$2000 -- two to three thousand dollars that
17 they hadn't paid over a period of time of 12 or more
18 months, and it's going to cost us \$400 to block, but
19 we're willing to do that to put a stop to it.

20 Ironically, the check came in the mail
21 the day I was penning the letter to the carrier to
22 tell them we were terminating service. He knew
23 nothing about our efforts, but we just got lucky on
24 that one, but my point is we're willing to pay 400 to
25 chase 2000, so I don't think we're going to let this

1 go too long.

2 Q. So why is the secondary blocking such
3 an important issue?

4 A. Secondary blocking?

5 Q. I mean secondary liability.

6 A. Because I think at some point, I would
7 like for people to recognize that Southwestern Bell,
8 and I'm picking on them because they're the biggest
9 carrier with most of us subtening them, but to a
10 limited extent, Sprint as well, have a responsibility
11 for the traffic they transit to us.

12 They act as though it's something they
13 have to do, they have no control over it, and they
14 shouldn't be held liable, but right now we are a 100
15 percent liable for traffic we have no control over,
16 we didn't put on the network, comes to us, we can't
17 identify, and we have to terminate them, and I think
18 they ought to have some skin in the game. That's my
19 belief.

20 Now, I think you put some of it in
21 there in that '97 Order, and I'm here to collect.

22 Q. And it's terminating to your clients'
23 customers, right, it's calls that your clients'
24 customers are receiving?

25 A. Correct.

1 Q. Which I would think your clients would
2 want their customers to receive whatever calls they
3 wanted to receive.

4 A. Absolutely. I mean, that was our
5 thought all along, and one of the thought processes
6 we went through to decide whether to file a complaint
7 or to block service. We are very reluctant to block,
8 have always been, but we now realize in this day and
9 age with all of the various carriers sending that
10 traffic, that that may be the only effective means to
11 enforce these tariffs.

12 And the other thing we're finding out
13 is when you block them, they have another way to get
14 it to you. They can send it via an interexchange
15 carrier, so it's not really that your customer
16 doesn't get the call, it just comes in via a
17 different trunk, and we get compensated when it comes
18 over an IXE trunk.

19 Q. But if the transiting carrier had
20 secondary liability, you wouldn't have to do
21 anything. I mean theoretically, you wouldn't have to
22 do anything other than say we didn't get paid from
23 the wireless carrier, transiting carrier, pay us.

24 A. I think your Order contemplated that we
25 would do something, although you told Bell in the

1 Order denying clarification that you didn't adopt
2 their provision that we exhaust our remedies, but I
3 think we have to do something.

4 I don't think we can sit back and
5 expect this traffic to keep coming to us and we look
6 to Southwestern Bell to get paid. I think we have to
7 make some effort to get paid by the wireless carrier.
8 You need to tell me what that effort is. I think
9 we've gone the extra mile in this case.

10 Q. But you've still allowed the traffic to
11 keep coming through and bill to be increasing?

12 A. Once I filed the case, and this is my
13 opinion, once I filed the case, I believe I have
14 elected a remedy to pursue, which is a Complaint
15 case, and the blocking was no longer an option
16 because the issue -- one of the issues that have been
17 T'd up for you in this case is the validity of our
18 wireless tariff, and that wireless tariff is what
19 gives us the authority to block, so I elected this
20 course of action.

21 Would I have done it differently had I
22 known everything then that I know now, you bet. But
23 this is the course we elected to pursue back in May
24 of '02, and I feel I am stuck with it until I get a
25 decision from you all reaffirming the validity of

1 that tariff so I can put a stop to this traffic, and
2 hopefully get paid for all of the traffic that's been
3 delivered today.

4 Q. And if we did not hold Southwestern
5 Bell secondarily liable, you could immediately, after
6 our decision, ask them to block the traffic, could
7 you not?

8 A. Absolutely.

9 Q. And then assuming you got paid, you
10 could start it up again, if you wanted to?

11 A. Sure.

12 Q. You wouldn't even have to allow that
13 traffic to your customers if you didn't want to,
14 would you?

15 A. Well, I mean, I think if T-Mobile
16 brings their account up-to-date and complies in all
17 other respects with either our wireless tariff or
18 negotiates and consummates an interconnection
19 agreement and abides by the terms of that
20 interconnection agreement, then we're obligated to
21 turn the trunks back on or allow the traffic to
22 terminate.

23 Q. And under the agreement that's -- that
24 you and the wireless carriers are willing to enter
25 into here, your stip and agreement, they've agreed to

1 pay; is that correct?

2 A. Uh-huh, yes, I'm sorry, the wireless

3 carriers you mean?

4 Q. Uh-huh.

5 A. Yes, uh-huh.

6 Q. So there's really no issue about the

7 amount owed to date that you're going to get paid?

8 A. I'm having a hard time with your

9 question because we've got agreements between some of

10 the small companies and Verizon and some of the small

11 companies and Sprint PCS.

12 Q. I'm just talking about the two that are

13 here before us.

14 A. Oh, I'm sorry, okay. Could you restate

15 your question, then, please?

16 Q. If we approve what you two parties are

17 willing to enter into, the agreement, correct --

18 A. Uh-huh.

19 Q. -- and leave the secondary liability

20 just out of it, but we approve that agreement that --

21 with the factors and that the wireless companies will

22 pay you, they've agreed to pay you what they owe you,

23 have they not, based on those factors?

24 A. They've agreed that the traffic can be

25 divvied up based on those factors. I don't know that

1 I've -- except for Mr. Williams on behalf of Western,
2 I don't believe I've heard a commitment on behalf of
3 T-Mobile to pay us.

4 Q. So there still may be a dispute as to
5 the amount owed by T-Mobile?

6 A. Right.

7 Q. Okay.

8 COMMISSIONER MURRAY: I think that's
9 all. Thank you.

10 JUDGE THOMPSON: Thank you,
11 Commissioner. Other questions from the bench? Now,
12 don't try to get away too quick, Mr. England.

13 QUESTIONS BY JUDGE THOMPSON:

14 Q. With respect to the third impediment
15 that you mentioned --

16 A. Yes.

17 Q. Pre-tariff traffic --

18 A. Correct.

19 Q. Is there any of that at issue in this
20 case?

21 A. No, there is not, and thank you for
22 asking, because in another complaint case, there is
23 some of that, so no, this is all what I call
24 post-tariff wireless tariff traffic.

25 Q. Very good. And in terms of where you

1 go from here, can you go to Federal Court?

2 A. I don't believe so.

3 Q. Okay.

4 A. I'm not going to say absolutely not,
5 but my experience and understanding is that I go to
6 State Court and sue on the Order.

7 Q. Okay. Very good. Thank you.

8 JUDGE THOMPSON: Any further questions
9 from the Bench for any of counsel? Okay. At this
10 time then -- Mr. Bub, you have questions for someone?

11 MR. BUB: I thought you said comments
12 from counsel.

13 JUDGE THOMPSON: I'll be happy to take
14 comments.

15 MR. BUB: Earlier I was fishing for the
16 citation to give to Commissioner Murray about Tom
17 Hughes' testimony and our thoughts on the obligation
18 going forward on transit traffic. There is a cite in
19 Tom Hughes' testimony, and it's toward the back, and
20 I had it until my book fell to the floor, so that was
21 me. It starts on Page 16 of his rebuttal testimony
22 and goes through -- through 21.

23 JUDGE THOMPSON: Thank you, Mr. Bub.

24 MR. BUB: You're welcome, your Honor.

25 And there's also a question about

1 whether there was any representations from T-Mobile
2 and Western Wireless to pay the interMTA liability
3 that will be produced from the factor, and in
4 response to Recross-Examination from Mr. Bates, and
5 this would be under Tab 3 on Page 160, Mr. Bates
6 question was based on negotiated interMTA factors
7 between T-Mobile and Western Wireless and
8 Complainants, does T-Mobile, excuse me, do T-Mobile
9 and Western agree that they are responsible for
10 payment for interMTA traffic terminating to
11 Complainants.

12 Answer: Yes, we're responsible for the
13 traffic generated from our networks, plural, that is
14 interMTA traffic that is terminated to the
15 Complainants. So from my -- that was a
16 representation from both of the companies to pay for
17 interMTA traffic that was produced from the fact that
18 they agreed to.

19 And the only point that I'd like to
20 bring up in response to some comments earlier that
21 Mr. England made was that it was -- they acknowledged
22 it was their election to pursue a remedy, and when
23 you approve the tariff here, their wireless
24 termination tariffs, at that time they were free to
25 go forward and file this complaint.

1 Now, it was challenged by the wireless
2 carriers, including our affiliate. We didn't
3 challenge it. The only thing that we objected to
4 here before the Commission was blocking. We did not
5 object to the rate, we didn't object to anything in
6 the tariff before the Commission except for blocking,
7 and we did not participate in any future appeals.

8 My wireless affiliate, Cingular, did,
9 as well as some others. That was affirmed in Cole
10 County Circuit Court. They took it further to the
11 Western District Court of Appeals, and it was, as you
12 know, affirmed there as well, and I think Mr. England
13 probably has a better feel for it because it was his
14 case, but I think there was also a request for
15 rehearing and maybe to the Supreme Court, and that
16 was denied, so all through that whole process, they
17 were free to bring this case, this Complaint case
18 today, and it was their choice, not ours, as to the
19 timing, and we do object to being prejudiced by the
20 timing, because I think in this case it was a
21 material impact on us.

22 If they'd asked us, even, you know, if
23 Mr. England was concerned about the effectiveness of
24 his tariff, we weren't, we would have blocked at
25 their request because we had a valid Order from you,

1 and we made that clear during our case. We didn't
2 think that blocking was appropriate, but if you
3 Ordered it, we would do it. Period.

4 JUDGE THOMPSON: Thank you, Mr. Bub.
5 Commissioner Clayton.

6 QUESTIONS BY COMMISSIONER CLAYTON:

7 Q. I just want to be clear on something,
8 and I misunderstood when I was asking you questions
9 earlier about disputes that you would have with
10 people in light of your interconnection agreement.
11 You mentioned that there was a difference in cases
12 above 25,000 in dispute and below 25,000 in dispute,
13 correct?

14 A. Yes.

15 Q. In this case where you have an amount
16 in dispute greater than 25,000, well in excess of
17 25,000, is it an accurate statement that if we were
18 to Order -- just assume that we were to Order the
19 secondary liability arrangement and approve the
20 agreement and the rates and everything else, that a
21 letter is sent by the Complainants to the other
22 Respondents, they refuse to pay, and say in two weeks
23 they send a demand letter to you, could you not,
24 according to your interconnection agreement turn them
25 off in 30 days?

1 A. I looked at the language that Mr.
2 England referenced in our agreement, and we do have
3 language that would allow us to terminate that
4 agreement, but now would that make us go back to our
5 tariff? I think if that were to happen, they would
6 ask immediately for renegotiations under the Act, and
7 we'd be back in front of you with two things.

8 Q. Do you think that would get their
9 attention?

10 A. It would get their attention, but it
11 would -- we'd have an arbitration here over a new
12 agreement, and we'd also have a collection action.

13 Q. But that arbitration, I thought, was
14 for under 25,000.

15 A. No, I'm sorry, an arbitration for a new
16 interconnection agreement, not for the unpaid amount
17 in dispute.

18 Q. I don't care about future stuff, but
19 they can't renegotiate on stuff that's already
20 happened, can they?

21 A. I think we're talking about two things,
22 Commissioner.

23 Q. All right.

24 A. The premise of your question I
25 understood is if they dishonored their

1 indemnification obligation to us, could they
2 terminate the interconnection agreement, and there is
3 language in that agreement that says we can do that,
4 so then now there's no interconnection agreement and
5 would they have to terminate under the tariff, but I
6 don't think that would happen for awhile because they
7 immediately would ask for a new interconnection
8 agreement. So on a separate track, we would have
9 negotiations for a new interconnection agreement and
10 then arbitrations over here.

11 Q. And you think they would do that rather
12 than just pay the bill?

13 A. I don't know what they do would do,
14 your Honor.

15 Q. Okay. Thank you.

16 A. But one more thing we would have a
17 collection action and while we may have some
18 indemnification from Mr. England's attorney's fees,
19 we would not for our own under this.

20 Q. Could you include that in your
21 renegotiation?

22 A. We could, we could ask for it.

23 Q. Maybe something that you all want to
24 think about. I'm just kidding. Thank you.

25 A. Well, we would probably rethink the,

1 you know, the transit issue because it's not
2 something that benefits us. We've asked to be
3 relieved and to limit the transit obligation because
4 it is really a burden on us and we get a very small
5 amount of money for it, so it's not something we're
6 looking to do.

7 Q. Okay.

8 COMMISSIONER CLAYTON: Thank you.

9 JUDGE THOMPSON: Commissioner Murray.

10 QUESTIONS BY COMMISSIONER MURRAY:

11 Q. Mr. Bub, if you were to terminate an
12 interconnection agreement with the wireless carrier,
13 could that carrier come back to you and choose to
14 just adopt another carrier's interconnection
15 agreement?

16 A. I think they could enter into other
17 agreements, because I think that's what happened. I
18 think the first wireless interconnection agreement we
19 had was with CMT partners, and I think the rest of
20 them fell in line and adopted that one.

21 Q. And that would prevent you from getting
22 any terms in there that you might --

23 A. That might, I didn't think of that,
24 your Honor, but it might, as you've seen on the
25 CLEC's side, they periodically took advantage of the

1 best agreement that's out there.

2 Q. And they're allowed to do that, just
3 take someone else's agreement in toto if they chose
4 to; is that right?

5 A. As long as they take it in toto, yes, I
6 believe so.

7 Q. Okay. Thank you.

8 JUDGE THOMPSON: Further questions from
9 the bench?

10 JUDGE THOMPSON: Mr. Bub, before you
11 get away, I have a couple for you.

12 MR. BUB: Absolutely, your Honor.

13 QUESTIONS BY JUDGE THOMPSON:

14 Q. The rates for transit, I understand
15 over 99 percent of this traffic is now carried
16 pursuant to interconnection agreements; is that
17 right?

18 A. Yes, your Honor.

19 Q. And those agreements are not subject to
20 price caps; is that right?

21 A. They're in the interconnection
22 agreements, so I believe not. I think they're
23 outside of our tariffs. I know they're outside of
24 our tariffs except for what might be interMTA, then
25 our access tariff would apply to that just like

1 Complainants' access tariff applies to interMTA
2 traffic.

3 Q. And traffic blocking, is that just the
4 traffic going to the small ILEC that requests the
5 blocking or is that all the traffic that T-Mobile is
6 delivering to Southwestern Bell in the state of
7 Missouri?

8 A. Only that traffic that goes to the
9 specific LEC, small LEC behind us that asks for it.
10 Remember the authority that we have to do that
11 blocking is your Order approving their specific
12 tariffs, so in this case, well, let's take a real
13 life example.

14 Goodman, Seneca, and Ozark, they each
15 had those tariffs that you approved and they told us
16 to block T-Mobile, so we blocked T-Mobile traffic
17 going to those three company's different exchanges
18 and there were a handful of them.

19 Q. Okay. Thank you.

20 JUDGE THOMPSON: Further questions?
21 Hearing none. You may step down. Thank you very
22 much.

23 MR. BUB: Thank you.

24 JUDGE THOMPSON: Thank you very much.

25 At this time, we will adjourn the oral

1 argument. I'm not going to ask anyone else if they
2 have anything else because someone will certainly
3 raise their hand. Thank you all very much for very
4 able presentations, we appreciate your effort to be
5 here today and to advise the Commission. Thank you.
6 We are adjourned.

7 WHEREUPON, the recorded portion of the
8 closing arguments was concluded.

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